

6013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X
UNITED STATES OF AMERICA : 13-CR-607

-against-

US District Court
Central Islip, NY

PHILLIP A. KENNER a/k/a
PHILIP A. KENNER, and
TOMMY C. CONSTANTINE a/k/a
TOMMY C. HORMOVITIS,

Defendants.: July 7, 2015
- - - - - X 9:55 am

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government:

KELLY T. CURRIE
United States Attorney
One Pierrepont Plaza
Brooklyn, New York 11201
By: JAMES MISKIEWICZ, ESQ.
SARITA KOMATIREDDY, ESQ.
United States Attorneys

For the Defense:

RICHARD D. HALEY, ESQ.
For Defendant Kenner

ROBERT LaRUSSO, ESQ.
ANDREW L. OLIVERAS, ESQ.
For Defendant Constantine

Court Reporter:

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US District Courthouse
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Central Islip, New York 11722
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Proceedings recorded by mechanical stenography.
Transcript produced by CAT.

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1 (Call to Order of the Court. Appearances stated
2 as indicated above.)

3 MR. LaRUSSO: Could I bring to your attention
4 one matter? It won't take too long. I don't want to
5 prolong this but yesterday during the rebuttal summation,
6 there were at least three comments that we believe were
7 made by the prosecution that there was no support for in
8 the record.

9 One, she claimed that the Falcon 10 airplane was
10 sold at least four times. We know that it was sold only
11 once and the second sale never occurred. You will
12 remember the actual transaction being held in escrow by I
13 believe a transfer agent.

14 D'Ambrosio. She said the chart was wrong
15 because Gentry's interest was not on there. I don't
16 recall that ever actually being part of the record. I
17 think he said the chart was accurate as far as he was
18 aware.

19 And then the last one, Judge, deals with the
20 discussion that Mr. Constantine's own lawyer was aware
21 that the money it spent for the Global Settlement Fund was
22 for permission to land helicopters on its land.

23 The only reason I bring this up, Judge, is that
24 I know the Court instructed the jurors before the
25 summations in regards to what happens when there may be

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1 facts presented to the jury that are different than their
2 recollection and they have the opportunity to verify the
3 information.

4 In light of what has transpired, I don't know if
5 the Court is going to make mention of this during the
6 charge, but I would ask the court at some point maybe if
7 you think it appropriate just to remind them that it is
8 not just prosecutor summations but the summations of the
9 attorneys where they present facts that are different than
10 their recollection, they should rely on their
11 recollection. Or they have the right to go to the
12 transcript.

13 That is the only request I ask the Court. I
14 don't know if you would do that.

15 THE COURT: Yes, I will do that before I get to
16 the charge. I will remind them of that.

17 MR. LaRUSSO: Thank you.

18 MR. HALEY: I would join in that application,
19 your Honor. Thank you.

20 THE COURT: Okay. So do defense counsel have
21 any issues with the redacted superseding indictment?

22 MR. LaRUSSO: No, your Honor.

23 MR. HALEY: No, sir.

24 THE COURT: All right. Anything else before I
25 bring the jury out?

1 MR. MISKIEWICZ: Just with respect to the
2 instruction.

3 Will the court be instructing specifically as to
4 all parties or just that the government has allegedly made
5 some misstatements of fact?

6 THE COURT: No. I'm just going to say overall.
7 I'm going to remind them that attorneys' summations are
8 not evidence. If they say something about the evidence
9 that is different from their recollection, it is their
10 recollection that.

11 MR. MISKIEWICZ: Thank you. We join in that
12 application.

13 MR. LaRUSSO: That was my request. I wasn't
14 looking to be specific to the government.

15 MR. HALEY: May I move the lectern?

16 THE COURT: Yes.

17 And I think I mentioned this to you before. I
18 want to make sure there is no objection. I will tell them
19 at the beginning, so they are not frantically trying to
20 write down everything that I say, that if they want a copy
21 of my instructions in writing, that I will provide it to
22 them at their request.

23 There is no objection to that, is there?

24 MR. MISKIEWICZ: No, your Honor.

25 MR. LaRUSSO: No, your Honor.

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1 MR. HALEY: No, sir.

2 THE COURT: And the exhibits, other than the
3 ones Ms. Komatireddy is tracking down, they are all set to
4 go?

5 MR. HALEY: Yes.

6 THE COURT: Mr. LaRusso, you have them all ready
7 to go?

8 MR. LaRUSSO: We have our exhibits here with an
9 exhibit list that was provided I believe this morning.

10 MR. OLIVERAS: There is a question and I am
11 checking the record now, a section, about a document.

12 MR. LaRUSSO: We will have that done before,
13 Judge.

14 MR. HALEY: I also have a question on one
15 exhibit. I am sure I can resolve it with the government.

16 THE COURT: Let's bring the jury in.

17 (The following ensued in the presence of the
18 jury.)

19 COURT'S CHARGE TO THE JURY

20 THE COURT: Good morning, members of the jury.
21 It is good to see everyone this morning.

22 As you know, I am now going to give you my
23 instructions on the law. Before I do that, I want to
24 remind you of an instruction I gave you before the
25 summations. It is a very important instruction and I want

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1 to repeat it to you.

2 The statements that the attorneys makes, both in
3 their opening statements and in their summations, are not
4 evidence. And to the extent that an attorney says
5 something about the evidence in their summation. And your
6 recollection is not consistent with their recollection of
7 what the evidence was, it your recollection that controls.
8 And if there is any question about this in the juror room,
9 as you know, you can ask to have the court reporter read
10 back any portion of testimony or you can ask for any
11 exhibit that you wish during your deliberations.

12 I'm now going to give you my instructions on the
13 law. Let me just tell you you are free to take notes. If
14 you want to take notes, you are free to take notes, but I
15 don't do this off the top of my head. Everything I'm
16 telling you is written down here and you can request a
17 copy of what I am reading to you in your deliberations.
18 Just send me a note saying send us a copy of instructions
19 and I will send this back to you.

20 The law requires me to read it out loud to you
21 but you are also entitled to a copy.

22 It is going to take pretty much the whole
23 morning. We will take a break at around 11, 11:15. If
24 anyone needs a break before then, just raise your hand.

25 Now that the evidence in this case has been

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1 presented, and the attorneys for the government and the
2 defendants have concluded their closing arguments, it is
3 my responsibility to instruct you as to the law that
4 governs this case. My instructions will be in three
5 parts.

6 First, I will instruct you regarding the general
7 rules that define and govern the duties of a jury in a
8 criminal case.

9 Second, I will instruct you as to the legal
10 elements of the crimes charged in the indictment; that is,
11 the specific elements that the government must prove
12 beyond a reasonable doubt to warrant a finding of guilt.

13 And, third, I will give you some general rules
14 regarding your deliberations.

15 Part I - General Rules.

16 To begin with, it is your duty to find the facts
17 from all of the evidence in this case. You are the sole
18 judges of the facts and it is, therefore, for you and you
19 alone to pass upon the weight of the evidence, and to draw
20 such inferences as you deem to be reasonable and warranted
21 from the evidence or lack of evidence in this case.

22
23 With respect to any question concerning the
24 facts, it is your recollection of the evidence that
25 controls. To the facts as you find them, you must apply

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1 the law in accordance with my instructions.

2 While the lawyers may have commented on some of
3 these legal rules, you must be guided only by what I
4 instruct you about them. You must follow all the rules as
5 I explain them to you. You may not follow some and ignore
6 others.

7 The fact that this prosecution is brought in the
8 name of the United States Government does not entitle the
9 United States to any greater consideration than the
10 defendants are entitled to. By the same token, it is
11 entitled to no less consideration. The parties, the
12 United States Government and the defendants, are equal
13 before this court, and they are entitled to equal
14 consideration. Neither the government nor the defendants
15 are entitled to any sympathy or favor.

16 I am now going to give you instructions on the
17 presumption of innocence and burden of proof.

18 You must remember that the indictment in this
19 case is only an accusation. It is not evidence. Each of
20 the defendants have pled not guilty to that indictment.

21 As a result of each defendant's plea of not
22 guilty, the burden is on the prosecution to prove each
23 defendant's guilt beyond a reasonable doubt. This burden
24 never shifts to a defendant for the simple reason that the
25 law never imposes upon a defendant in a criminal case the

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1 burden or duty of calling any witness or producing any
2 evidence.

3 The law presumes each defendant to be innocent
4 of all the charges against him. I therefore instruct you
5 that each defendant is to be presumed by you to be
6 innocent throughout your deliberations until such time, if
7 ever, you as a jury are satisfied that the government has
8 proven one or both of them guilty beyond a reasonable
9 doubt.

10 Each defendant begins the trial here with a
11 clean slate. This presumption of innocence alone is
12 sufficient to acquit a defendant unless you as jurors are
13 unanimously convinced beyond a reasonable doubt of his
14 guilt, after a careful and impartial consideration of all
15 of the evidence in this case. If the government fails to
16 sustain its burden, you must find the defendant you are
17 considering not guilty.

18 This presumption was with the defendants when
19 the trial began and remains with the defendants even now
20 as I speak to you and will continue with the defendants
21 into your deliberations unless and until you are convinced
22 that the government has proven their guilt beyond a
23 reasonable doubt.

24 I will now give you instructions about proof
25 beyond a reasonable doubt. I have said that the

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1 government must prove each defendant guilty beyond a
2 reasonable doubt. The question naturally is what is a
3 reasonable doubt?

4 The words almost define themselves. It is a
5 doubt based upon reason and common sense. It is a doubt
6 that a reasonable person has after carefully weighing all
7 of the evidence. It is a doubt which would cause a
8 reasonable person to hesitate to act in a matter of
9 importance in his or her personal life. Proof beyond a
10 reasonable doubt must, therefore, be proof of such a
11 convincing character that a reasonable person would not
12 hesitate to rely and act upon it in the most important of
13 his own affairs.

14 A reasonable doubt is not a caprice or whim; it
15 is not a speculation or suspicion. It is not an excuse to
16 avoid the performance of an unpleasant duty. And it is
17 not sympathy.

18 In a criminal case, the burden is at all times
19 upon the government to prove guilt beyond a reasonable
20 doubt. The law does not require that the government prove
21 guilt beyond all possible doubt; proof beyond a reasonable
22 doubt is sufficient to convict. This burden never shifts
23 to the defendants, which means that it is always the
24 government's burden to prove each of the elements of the
25 crimes charged beyond a reasonable doubt.

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1 If, after fair and impartial consideration of
2 all of the evidence, you have a reasonable doubt, it is
3 your duty to acquit the defendant you are considering. On
4 the other hand, if after fair and impartial consideration
5 of all the evidence you are satisfied of the defendant's
6 guilt beyond a reasonable doubt, you should vote to
7 convict.

8 I wish to instruct you now as to what is
9 evidence and how you should consider it. The evidence
10 upon which you are to decide what the facts are comes in
11 several forms:

12 One. Sworn testimony of witnesses, both on
13 direct and cross-examination.

14 Two. Exhibits that have been received in
15 evidence by the court.

16 And, three, facts or testimony to which the
17 lawyers have agreed or stipulated.

18 What is not evidence. Certain things are not
19 evidence and are to be disregarded by you in deciding what
20 the facts are.

21 One. The contents of the indictment are not
22 evidence.

23 Two. Arguments or statements by lawyers are not
24 evidence.

25 Three. Questions put to the witnesses are not

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1 evidence.

2 Four. Objections to the questions or to offered
3 exhibits are not evidence. In this regard, attorneys have
4 a duty to their clients to object when they believe
5 evidence should not be received. You should not be
6 influenced by the objection or by the court's ruling on
7 it. If the objection was sustained, ignore the question.
8 If the objection was overruled, treat the answer like any
9 other answer. If I told you to disregard certain
10 testimony or sustained a lawyer's request to disregard or
11 strike certain testimony, you are to disregard the
12 testimony.

13 Five. What I say in these instructions is not
14 evidence.

15 Six. If evidence has been received for a
16 limited purpose, you must consider that evidence for that
17 limited purpose only.

18 Seven. Obviously, anything you may have seen or
19 heard outside the courtroom is not evidence. Your verdict
20 must be based solely upon the evidence developed at trial
21 or the lack of evidence. It would be improper for you to
22 consider, in reaching your decision as to whether the
23 government sustained its burden of proof, any personal
24 feelings you may have about the defendants' race,
25 religion, national origin, ethnic background, sex, or age.

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1 All persons are entitled to the presumption of
2 innocence and the government has the same burden of proof
3 regardless of who the defendant is.

4 In addition, it would be equally improper for
5 you to allow any feelings you might have about the nature
6 of the crimes charged to interfere with your
7 decision-making process.

8 To repeat, your verdict must be based
9 exclusively upon the evidence or the lack of evidence in
10 the case.

11 I am now going to instruct you on direct and
12 circumstantial evidence. I told you that evidence comes
13 in various forms such as the sworn testimony of witnesses,
14 exhibits, and stipulations. There are, in addition,
15 different kinds of evidence - direct and circumstantial.

16
17 Direct evidence is the communication of a fact
18 by a witness who testifies to the knowledge of that fact
19 as having been obtained through one of the five senses.
20 So, for example, a witness who testifies to knowledge of a
21 fact because he saw it, heard it, smelled it, tasted it,
22 or touched it is giving evidence which is direct. What
23 remains is your responsibility to pass upon the
24 credibility of that witness.

25 Circumstantial evidence is evidence which tends

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1 to prove a fact in issue by proof of other facts from
2 which the fact in issue may be inferred. The word "*infer*"
3 or the expression "*to draw an inference*" means to find
4 that a fact exists from proof of another fact.

5 For example, if a fact in issue is whether it is
6 raining at the moment, neither of us can testify directly
7 to that fact sitting as we are in this windowless
8 courtroom. Assume, however, that as we are sitting here,
9 a person walks into the courtroom wearing a raincoat that
10 is soaking wet and carrying an umbrella dripping water.
11 We may infer that it is raining outside. In other words,
12 the fact of rain is an inference that could be drawn from
13 the wet raincoat and the dripping umbrella.

14 An inference is to be drawn only if it is
15 logical and reasonable to do so. In deciding whether to
16 draw an inference, you must look at and consider all the
17 facts in the light of reason, common sense, and
18 experience. Whether a given inference is or is not to be
19 drawn is entirely a matter for you, the jury, to decide.
20 Please bear in mind, however, that an inference is not to
21 be drawn by guesswork or speculation.

22 I remind you once again that you may not convict
23 the defendants unless you are satisfied of their guilt
24 beyond a reasonable doubt, whether based on direct
25 evidence, circumstantial evidence, or the logical

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1 inferences to be drawn from such evidence.

2 Circumstantial evidence does not necessarily
3 prove less than direct evidence, nor does it necessarily
4 prove more. You are to consider all the evidence in the
5 case, direct and circumstantial, in determining what the
6 facts are and in arriving at your verdict.

7 The fact that one party called more witnesses
8 and introduced more evidence than the other does not mean
9 that you should necessarily find the facts in favor of the
10 side offering the most witnesses. By the same token, you
11 do not have to accept the testimony of any witness who has
12 not been contradicted or impeached, if you find the
13 witness not to be credible.

14 You also have to decide which witnesses to
15 believe and which facts are true. To do this you must
16 look at all the evidence, drawing upon your own common
17 sense and personal experience. After examining all the
18 evidence, you may decide that the party calling the most
19 witnesses has not persuaded you because you do not believe
20 its witnesses, or because you do believe the fewer
21 witnesses called by the other side.

22 In a moment I will discuss the criteria for
23 evaluating credibility. For the moment, however, you
24 should keep in mind that the burden of proof is always on
25 the government and the defendants are not required to call

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1 any witnesses or offer any evidence, since they are
2 presumed to be innocent.

3 I am now going to give you an instruction about
4 consideration of each defendant separately. The
5 indictment names two defendants who are on trial together.
6 In reaching your verdict, however, you must consider each
7 defendant separately. Your verdict as to each defendant
8 must be determined separately with respect to him, solely
9 on the evidence, or lack of evidence, presented against
10 him, without regard to the guilt or innocence of the other
11 defendant on trial or anyone else.

12 In addition, some of the evidence in this case
13 was limited to only a particular defendant. Let me
14 emphasize that any evidence admitted solely against one
15 defendant may be considered only as against that defendant
16 and may not in any respect enter into your deliberations
17 on any other defendant.

18 It is your duty to give separate and personal
19 consideration to the case of each defendant. When you do
20 so, you should analyze what the evidence in the case shows
21 with respect to that defendant, leaving out of
22 consideration entirely any evidence admitted solely
23 against the other defendant.

24 Each defendant is entitled to have his case
25 determined from evidence as to his own acts, statements,

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1 and conduct, and any other evidence in the case which may
2 be applicable to him. The fact that you return a verdict
3 of guilty or not guilty to one defendant should not, in
4 any way, affect your verdict regarding the other
5 defendant.

6 In this regard you may have noticed during the
7 course of the trial that the lawyers for the defendants
8 have at times consulted with each other, and have divided
9 some of the work of the trial in an effort to avoid
10 duplicating each other.

11 The fact that lawyers have consulted and
12 cooperated with each other during the course of the trial
13 should not be considered by you as having any significance
14 to any issues in this case.

15 The indictment contains a number of counts.
16 Each count charges a defendant with a different crime.
17 There are two defendants on trial before you. You must,
18 as a matter of law, consider each count of the indictment
19 and each defendant's involvement in that count separately,
20 and you must return a separate verdict on each defendant
21 for each count in which he is charged.

22 In reaching your verdict, bear in mind that
23 guilt is personal and individual. Your verdict of guilty
24 or not guilty must be based solely upon the evidence about
25 each defendant. The case against each defendant, on each

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1 count, stands or falls upon the proof or lack of proof
2 against the defendant alone, and your verdict as to any
3 defendant on any count should not control your decision as
4 to any other count. No other considerations are proper.

5 My next instruction relates to the rulings and
6 statements that I made during the course of this trial. I
7 hereby instruct you that nothing that I said during the
8 course of the trial, no question that I have asked, no
9 ruling that I have made, and no statement that I may make
10 in this charge, should be interpreted in any way
11 whatsoever as a suggestion of what decision I believe you
12 should make. You should understand that I have no opinion
13 as to the decision you should make in this case.

14 You will remember that at various times
15 throughout the trial, I have been called upon to make
16 rulings on various questions of law. I have sustained
17 objections and I have overruled objections. Please do not
18 concern yourself with my reasons for making the rulings
19 that I made. These are purely legal matters and must not
20 affect your deliberation on the factual matters in this
21 case. Nor are you to draw any inferences for or against a
22 party because that party raised objections during the
23 course of the case.

24 It is the duty of the attorneys on each side of
25 the case to object when the other side offers testimony or

Court's Charge

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1 other evidence which the attorney believes is not properly
2 admissible. You should not hold it against an attorney or
3 a defendant either because the attorney has made
4 objections, or because some of those objections may have
5 been overruled by me.

6 When the Court has sustained an objection to a
7 piece of evidence or a question addressed to a witness,
8 you must disregard it entirely and may draw no inference
9 from it or speculate as to what the witness would have
10 said if he or she had been permitted to answer the
11 question.

12 Similarly, if after a question was asked and an
13 answer given, the answer was ordered stricken from the
14 record, you must disregard both the answer and the
15 question.

16 You are further instructed that with respect to
17 every situation where testimony has been stricken, the
18 reason for that ruling relates to a matter of law which is
19 no concern of yours and not for your consideration. Once
20 stricken, such testimony must be disregarded and ignored.

21 The reasons for my striking such testimony
22 should not be discussed among you, nor should you
23 speculate or guess about the basis for my ruling. By the
24 same token, where I allowed testimony or exhibits to be
25 received into evidence over the objection of counsel, this

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1 was not an indication that I have any opinion as to the
2 weight or effect of such evidence. That is for you to
3 decide.

4 In reaching your verdict, you also are not to
5 concern yourselves in any way with the conferences which
6 sometimes took place at the side bar between the Court and
7 counsel for the parties, nor are you to draw any
8 inferences for or against any party because that party may
9 have requested such a conference.

10 You also must not draw any conclusion whatsoever
11 from the fact that from time to time I may have asked
12 questions of witnesses. This was solely to elicit facts
13 which may or may not be material to your determination.

14 Remember that, in making your determination as
15 to the facts, you should rely upon your own recollection
16 of the evidence. What I said from time to time during the
17 course of the trial, or what I say in the charge that I am
18 now giving you, should not be taken in place of your own
19 recollection of the evidence in this case.

20 You have had an opportunity to observe all of
21 the witnesses. It is now your job to decide how
22 believable each witness was in his or her testimony. You
23 are the sole judges of the credibility of each witness and
24 of the importance of his or her testimony. It must be
25 clear to you by now that you are being called upon to

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1 resolve various factual issues under the counts of the
2 indictment, in the face of the very different pictures
3 painted by the government and the defendants which cannot
4 be reconciled.

5 You will now have to decide where the truth
6 lies, and an important part of that decision will involve
7 making judgments about the testimony of the witnesses you
8 have listened to and observed. In making those judgments,
9 you should carefully scrutinize all of the testimony of
10 each witness, the circumstances under which each witness
11 testified, and any other matter in evidence which may help
12 you to decide the truth and the importance of each
13 witness' testimony.

14 Your decision whether or not to believe a
15 witness may depend on how that witness impressed you. Was
16 the witness candid, frank, and forthright? Or did the
17 witness seem as if he or she was hiding something, being
18 evasive or suspect in some way?

19 How did the way the witness testified on direct
20 examination compare with how the witness testified on
21 cross-examination?

22 Was the witness consistent in his or her
23 testimony or did he or she contradict himself or herself?
24 Did the witness appear to know what he or she was talking
25 about and did the witness strike you as someone who was

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1 trying to report his or her knowledge accurately?

2 How much you choose to believe a witness may be
3 influenced by the witness' bias. Does the witness have a
4 relationship with the government or one of the defendants
5 which may affect how he or she testified?

6 Does the witness have some incentive, loyalty or
7 motive that might cause him or her to shade the truth, or
8 does the witness have some bias, prejudice, or hostility
9 that may have caused the witness, consciously or not, to
10 give you something other than a completely accurate
11 account of the facts he or she testified to?

12 Even if the witness was impartial, you should
13 consider whether the witness had an opportunity to observe
14 the facts he or she testified about and you should also
15 consider the witness' ability to express himself or
16 herself. Ask yourselves whether the witness' recollection
17 of the facts stands up in light of all other evidence.

18
19 In other words what you must try to do in
20 deciding credibility is to size a person up in light of
21 his or her demeanor, the explanations given, and in light
22 of all the other evidence in the case, just as you would
23 in any important matter where you are trying to decide if
24 a person is truthful, straightforward and accurate in his
25 or her recollection. In deciding the question of

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1 credibility, remember that you should use your common
2 sense, your good judgment, and your experience.

3 In evaluating credibility of the witnesses, you
4 should take into account any evidence that the witness who
5 testified may benefit in some way from the outcome of this
6 case. Such an interest in the outcome creates a motive to
7 testify falsely and may sway the witness to testify in a
8 way that advances his or her own interests. Therefore, if
9 you find that any witness whose testimony you are
10 considering may have an interest in the outcome of this
11 trial, then you should bear that factor in mind when
12 evaluating the credibility of his or her testimony and
13 accept it with great care.

14 This is not to suggest that every witness who
15 has an interest in the outcome of a case will testify
16 falsely. It is for you to decide to what extent, if at
17 all, the witness' interest has affected or colored his or
18 her testimony.

19 You have heard the testimony of a witness who
20 has been promised that in exchange for testifying
21 truthfully, completely, and fully, he will not be
22 prosecuted for any crimes which he may have admitted
23 either here in court or in interviews with the
24 prosecutors. This promise was not a formal order of
25 immunity by the court, but was arranged directly between

Court's Charge

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1 the witness and the government.

2 The government is permitted to make these kinds
3 of promises and is entitled to call as witnesses people to
4 whom these promises are given. You are instructed that
5 you may convict a defendant on the basis of such a
6 witness' testimony, alone, if you find that his testimony
7 proves the defendant you are considering is guilty beyond
8 a reasonable doubt.

9 However, the testimony of a witness who has been
10 promised that he will not be prosecuted should be examined
11 by you with greater care than the testimony of an ordinary
12 witness. You should scrutinize it closely to determine
13 whether or not it is colored in such a way as to place
14 guilt upon the defendant in order to further the witness'
15 own interests; for, such a witness, confronted with the
16 realization that he can win his own freedom by helping to
17 convict another, has a motive to falsify his testimony.
18 Such testimony should be received by you with suspicion
19 and you may give it such weight, if any, as you believe it
20 deserves.

21 I am now going to give you an instruction
22 involving prior inconsistent statements. You have heard
23 evidence that a witness made a statement on an earlier
24 occasion which counsel argues is inconsistent with the
25 witness' trial testimony. Evidence of the prior

Court's Charge

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1 inconsistent statement was placed before you for the
2 limited purpose of helping you decide whether to believe
3 the trial testimony of the witness who contradicted
4 himself.

5 If you find that the witness made an earlier
6 statement that conflicts with his trial testimony, you may
7 consider that fact in deciding how much of his trial
8 testimony, if any, to believe. In making this
9 determination, you may consider whether the witness
10 purposely made a false statement or whether it was an
11 innocent mistake; whether the inconsistency concerns an
12 important fact, or whether it had to do with a small
13 detail; whether the witness had an explanation for the
14 inconsistency, and whether that explanation appealed to
15 your common sense.

16 It is exclusively your duty, based upon all the
17 evidence and your own good judgment, to determine whether
18 the prior statement was inconsistent, and if so how much,
19 if any, weight to be given to the inconsistent statement
20 in determining whether to believe all, or part, or none,
21 of the witness' testimony.

22 Now I am going to give you an instruction about
23 expert testimony. You have heard during the course of
24 this trial the testimony of individuals referred to as
25 experts in their fields.

Court's Charge

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1 If scientific, technical, or other specialized
2 knowledge will assist the jury to understand the evidence
3 or to decide a disputed fact, a witness with particular
4 knowledge, skill, experience, training or education, may
5 be called to testify about such evidence or facts in issue
6 in the form of an opinion.

7 The rules of evidence ordinarily do not permit
8 witnesses to testify to opinions or conclusions. An
9 exception to this rule exists for those we call "expert"
10 witnesses who may state their opinions and who may also
11 state the reasons for their opinion.

12 You should consider each expert witness' opinion
13 received in this case and give it such weight as you may
14 think it deserves. If you should decide that the opinion
15 of the witness is not based upon sufficient education and
16 experience, or that the reasons given in support of the
17 opinion are not sound, or that the opinion is outweighed
18 by other evidence, you may disregard the opinion entirely.
19 In sum, the expert witness is in all other respects the
20 same as any other witness.

21 You should consider his or her qualifications,
22 his or her experience, his or her interest in the outcome
23 of the case, if any, his or her demeanor, and all the
24 other factors you have been instructed to consider in
25 assessing the credibility of other witnesses.

Court's Charge

6039

1 I am now going to instruct you on law
2 enforcement witnesses. You have heard testimony of law
3 enforcement officers and government employees. The fact
4 that a witness may be employed as a law enforcement
5 officer does not mean that his testimony is necessarily
6 deserving of more or less consideration or greater or
7 lesser weight than that of an ordinary witness.

8 At the same time, it is quite legitimate for
9 defense counsel to try to attack the credibility of a law
10 enforcement witness on the grounds that his testimony may
11 be colored by a personal or professional interest in the
12 outcome of the case.

13 It is your decision, after reviewing all the
14 evidence, whether to accept the testimony of the law
15 enforcement witness and to give to that testimony whatever
16 weight, if any, you find it deserves.

17 You have heard reference, in the arguments of
18 defense counsel in this case, to the fact that certain
19 investigative techniques were not used by the government.
20 There is no legal requirement, however, that the
21 government prove its case through any particular means.
22 While you are to carefully consider the evidence adduced
23 by the government, you are not to speculate as to why they
24 used the techniques they did or why they did not use other
25 techniques.

Court's Charge

6040

1 The government is not on trial. Law enforcement
2 techniques are not your concern. Your concern is to
3 determine whether or not, on the evidence or lack of
4 evidence, each defendant's guilt has been proved beyond a
5 reasonable doubt.

6 I am now going to give you an instruction
7 regarding the defendant Kenner's testimony. The defendant
8 in a criminal case never has any duty to testify or come
9 forward with any evidence. This is because, as I have
10 told you, the burden of proof beyond a reasonable doubt
11 remains on the government at all times, and the defendant
12 is presumed innocent.

13 In this case, one of the defendants, Mr. Kenner,
14 did testify and he was subject to cross-examination like
15 any other witness. You should examine and evaluate his
16 testimony just as you would the testimony of any other
17 witness.

18 I am now going to give you an instruction about
19 the defendant Constantine's right not to testify. The
20 other defendant, Mr. Constantine, did not testify in this
21 case. As I mentioned, under our Constitution, a defendant
22 has no obligation to testify or to present any evidence,
23 because it is the government's burden to prove the
24 defendant guilty beyond a reasonable doubt. That burden
25 remains with the government throughout the entire trial

Court's Charge

6041

1 and never shifts to a defendant.

2 A defendant is never required to prove that he
3 or she is innocent. You may not attach any significance
4 to the fact that defendant Constantine did not testify.
5 No adverse inference against him may be drawn by you
6 because he did not take the witness stand. You may not
7 consider this against the defendant in any way in your
8 deliberations in the jury room.

9 In alleging dates, the indictment frequently
10 charges "*on or about*," and "*between*" certain dates. The
11 proof need not establish with certainty the exact date of
12 an alleged offense. The law only requires the evidence
13 establish beyond a reasonable doubt that the dates alleged
14 in the indictment and the date established by the
15 testimony or exhibits are substantially similar.

16 Now I am going to instruct you about other
17 persons not on trial. You have heard evidence about the
18 involvement of certain other people in the transactions
19 referred to in the indictment. That these individuals are
20 not on trial before you is not your concern. You should
21 neither speculate as to the reason these people are not on
22 trial before you nor allow their absence as parties to
23 influence in any way your deliberations in this case.

24 I am now going to give you an instruction
25 regarding stipulations. The attorney for the United

Court's Charge

6042

1 States and the attorneys for the defendants have entered
2 into stipulations concerning certain facts and testimony
3 that are relevant to this case.

4 A stipulation of fact is simply an agreement
5 among the parties that a certain fact is true. You should
6 regard such agreed facts as true. However, what weight to
7 give those facts is entirely up to you. You are the sole
8 judges of the facts and you decide what weight to give
9 those facts.

10 A stipulation of testimony is an agreement among
11 the parties that, if called, a witness would give certain
12 testimony. You must accept as true the fact that the
13 witness would have given that testimony in court.
14 However, it is for you to determine the effect to be given
15 that testimony.

16 Now I will give you an instruction about charts
17 and summaries. During the course of the trial, there were
18 charts and summaries admitted into evidence. The charts
19 and summaries were shown to you in order to make the other
20 evidence more meaningful and to aid you in considering
21 that evidence.

22 They are no better than the testimony or the
23 documents upon which they are based, and are not
24 themselves independent evidence; therefore, you are to
25 give no greater consideration to these charts or summaries

Court's Charge

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1 than you would give to the evidence upon which they are
2 based.

3 As a result, if you have any questions regarding
4 these charts or summaries you should turn to the actual
5 evidence; in particular, the documentary records upon
6 which the charts and summaries are based.

7 It is for you to decide whether the charts and
8 summaries correctly present information contained in the
9 testimony and in the exhibits on which they are based.
10 You are entitled to consider the charts and summaries if
11 you find that they are of assistance to you in analyzing
12 the evidence and understanding the evidence.

13 I am now going to give you an instruction about
14 transcripts of tape recordings. The government has been
15 permitted to hand out a typed document which it prepared
16 containing the government's interpretation of what appears
17 on the tape recordings which have been received as
18 evidence.

19 Those were given to you as an aid or guide to
20 assist you in listening to the tapes. However, they are
21 not in and of themselves evidence. Therefore, when the
22 tapes were played I advised you to listen very carefully
23 to the tapes, themselves. You, alone, should make your
24 own interpretation of what appears on the tapes based upon
25 what you heard.

Court's Charge

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1 If you think you heard something differently
2 than appeared on the transcript, then what you heard is
3 controlling. Let me say again, you, the jury, are the
4 sole judges of the facts.

5 You have heard evidence during the trial that
6 witnesses have discussed the facts of the case and their
7 testimony with the lawyers before the witnesses appeared
8 in court.

9 Although you may consider that fact when you are
10 evaluating a witness's credibility, I should tell you that
11 there is nothing either unusual or improper about a
12 witness meeting with lawyers before testifying so that the
13 witness can be aware of the subjects he will be questioned
14 about, focus on those subjects, and have the opportunity
15 to review relevant exhibits before being questioned about
16 them. Such consultation helps conserve your time and the
17 court's time. In fact, it would be unusual for a lawyer
18 to call a witness without such consultations.

19 Again, the weight you give to the fact or the
20 nature of the witness' preparation for his or her
21 testimony and what inferences you draw from such
22 preparation are matters completely within your discretion.

23 I am now going to give you an instruction
24 regarding good faith. The defendants contend that they
25 were acting in good faith in connection with all of the

Court's Charge

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1 actions described in the indictment.

2 Good faith is an absolute defense to all of the
3 charges in this case. If the defendant believed in good
4 faith that he was acting properly, even if he was mistaken
5 in that belief, and even if others were injured by his
6 conduct, there would be no crime.

7 The burden of establishing lack of good faith
8 and criminal intent rests upon the prosecution. A
9 defendant is under no burden to prove his good faith;
10 rather, the prosecution must prove bad faith or knowledge
11 of falsity beyond a reasonable doubt.

12 I will discuss the issue of intent in more
13 detail in a moment when I instruct you as to the elements
14 of each crime in the indictment. That concludes Part I.

15 Part II - Legal Elements of Charged Crimes.

16 I will now turn to the second part of this
17 charge, and I will, as I indicated at the outset, instruct
18 you as to the legal elements of the crimes charged in the
19 indictment. That is to say, I will now instruct you as to
20 the specific elements of the crimes charged, each of which
21 the government must prove beyond a reasonable doubt to
22 warrant a finding of guilt.

23 The summary of the indictment. In order to
24 place my instructions in context, I will start by giving
25 you a summary of the crimes charged. They are stated in

Court's Charge

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1 the indictment. I will give you a copy of the indictment
2 to refer to during your deliberations. But the indictment
3 is not evidence. It is simply the instrument by which the
4 charges are brought. It is an accusation. It may not be
5 considered by you as any evidence of the guilt of either
6 defendant. I am permitting you to have the indictment
7 solely as a reference during your deliberations.

8 After summarizing the charges, I will instruct
9 you in detail as to the law for you to apply to each
10 charge in the indictment.

11 And, finally, I will tell you some further rules
12 with respect to your deliberations.

13 First, the summary of the indictment. The
14 indictment contains nine counts, or separate charges or
15 offenses. They are numbered Counts One through Nine. You
16 must consider each count separately and return a verdict
17 based only upon the evidence as it relates to that
18 specific count.

19 You must also consider each defendant
20 separately. Whether you find a defendant not guilty or
21 guilty as to one offense should not affect your verdict as
22 to any other offense charged. Your verdict as to each
23 count and each defendant must be unanimous.

24 The indictment begins with what is called an
25 introduction. It is an introduction to all of the counts

Court's Charge

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1 of the indictment. In this case, the introduction alleges
2 that the defendants Phillip A. Kenner and Tommy C.
3 Constantine were engaged in an alleged scheme to defraud
4 involving several different investment vehicles and
5 separate victims.

6 I am not going to read the language of the
7 introduction to the indictment because it spans several
8 pages, but you will have a copy of the indictment in the
9 jury room with you and can refer to it.

10 I caution you once again that the indictment
11 itself is not evidence and is entitled to no independent
12 weight in your considerations. It is simply a list of
13 accusations.

14 Count One, in sum, charges the defendants,
15 Phillip A. Kenner and Tommy C. Constantine, together with
16 others, with conspiracy to commit wire fraud related to
17 the Hawaii Land Developments, the Eufora Investments, and
18 the Global Settlement Funds.

19 Counts Two through Six, in sum, charge the
20 defendants, Phillip A. Kenner and Tommy C. Constantine,
21 together with others, with wire fraud regarding the wiring
22 of funds on specific dates related to the Eufora
23 Investments.

24 Counts Seven and Eight, in sum, charge the
25 defendant Phillip A. Kenner with wire fraud regarding the

Court's Charge

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1 wiring of funds related to the Sag Harbor property.

2 Count Nine, in sum, charges the defendants,
3 Phillip A. Kenner and Tommy C. Constantine, together with
4 others, with conspiracy to commit money laundering.

5 I have summarized the counts in the indictment
6 simply to give you an overview of the charges. In your
7 deliberations as to each count, you should refer to the
8 exact text of the indictment. I will now explain to you
9 the law that applies to each of the counts in the
10 indictment.

11 Counts Two through Eight - Wire Fraud.

12 As the conspiracy in Count One depends in part
13 upon the law of wire fraud, I will begin with Counts Two
14 through Eight.

15 Counts Two through Eight of the indictment
16 charge the defendants with wire fraud. The indictment
17 charges that one or both of the defendants devised a
18 scheme to defraud, and in furtherance of that scheme
19 knowingly caused the interstate wires to be used.

20 Each of those counts relates to a specific use
21 of the wires on or about the dates specified in the
22 indictment. Specifically, Counts Two through Six charge
23 both defendants with wire fraud. Those counts read, in
24 relevant part, as follows.

25 *"On or about the dates set forth below, within*

Court's Charge

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1 *the Eastern District of New York and elsewhere, the*
 2 *defendants Phillip A. Kenner, also known as "Philip A.*
 3 *Kenner," and Tommy C. Constantine, together with others,*
 4 *did knowingly and intentionally devise a scheme and*
 5 *artifice to defraud the investors, and to obtain money and*
 6 *property from them by means of materially false and*
 7 *fraudulent pretenses, representations and promises, and*
 8 *for the purpose of executing such scheme and artifice, did*
 9 *transmit and cause to be transmitted writings, signs,*
 10 *signals, pictures and sounds by means of wire*
 11 *communication in interstate and foreign commerce, as set*
 12 *forth below."*

13 Count. Approximate Date of Wire Transmission.
 14 Description of Wire Transmission.

15 Two. February 12, 2009. \$30,000 wire transfer
 16 from an account at Wachovia Bank in Closter, New Jersey,
 17 to J. Kaiser's TD Bank account in the Eastern District of
 18 New York.

19 Three. February 26, 2009 . \$40,300 wire
 20 transfer from J. Kaiser's account at TD Bank in the
 21 Eastern District of New York to an account in the name of
 22 Kenner at Bank of America in Scottsdale, Arizona.

23 Four. May 22, 2009. \$25,000 wire transfer from
 24 Kenner's account at Bank of America in Scottsdale, Arizona
 25 to J. Kaiser's Wells Fargo account in the Eastern District

Court's Charge

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1 of New York.

2 Five. December 7, 2009. \$150,000 wire transfer
3 from Privitello's account at Fidelity Investments in the
4 Eastern District of New York to an account at 1st Century
5 Bank in Los Angeles, California.

6 Six. December 7, 2009. \$50,000 wire transfer
7 from Privitello's account at Citizens Bank in the Eastern
8 District of New York to an account at 1st Century Bank in
9 Los Angeles, California.

10 Counts Seven and Eight charge Phillip A. Kenner
11 with wire fraud in connection with the Sag Harbor
12 property. Those counts read, in relevant part, as
13 follows.

14 *"On or about the dates set forth below, within*
15 *the Eastern District of New York and elsewhere, the*
16 *defendant Phillip A. Kenner, also known as "Philip A.*
17 *Kenner," did knowingly and intentionally devise a scheme*
18 *and artifice to defraud Berard and Peca, and to obtain*
19 *money and property from them by means of materially false*
20 *and fraudulent pretenses, representations and promises,*
21 *and for the purpose of executing such scheme and artifice,*
22 *did transmit and cause to be transmitted writings, signs,*
23 *signals, pictures and sounds by means of wire*
24 *communication in interstate and foreign commerce, as set*
25 *forth below."*

Court's Charge

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1 Count. Approximate Date of Wire Transmission.

2 Description of Wire Transmission.

3 Seven. November 20, 2008. \$43,000 wire
4 transfer from Kenner's account at Wells Fargo Bank in
5 Scottsdale, Arizona, to the Ula Makika account at Northern
6 Trust Bank in Scottsdale, Arizona.

7 Eight. December 31, 2008. \$35,000 wire
8 transfer from Kenner's account at Wells Fargo Bank in
9 Scottsdale, Arizona, to the Little Isle IV account at
10 Northern Trust Bank in Scottsdale, Arizona.

11 The relevant statute regarding this subject is
12 Section 1343 of Title 18 of the United States Code, which
13 provides:

14 *"Whoever, having devised or intending to devise*
15 *any scheme or artifice to defraud, or for obtaining money*
16 *or property by means of false or fraudulent pretenses,*
17 *representations, or promises, transmits or causes to be*
18 *transmitted by means of wire, radio, or television*
19 *communication in interstate or foreign commerce, any*
20 *writings, signs, signals, pictures, or sounds for the*
21 *purpose of executing such scheme or artifice, shall be*
22 *guilty of a crime."*

23 Wire Fraud - Definition and Elements.

24 In order to prove the defendant you are
25 considering guilty of wire fraud under these counts, the

Court's Charge

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1 government must prove each of the following elements
2 beyond a reasonable doubt.

3 First. That there was a scheme or artifice to
4 defraud or to obtain money or property by materially false
5 and fraudulent pretenses, representations or promises, as
6 alleged in the indictment.

7 Second. That the defendant knowingly and
8 willfully participated in the scheme or artifice to
9 defraud, with knowledge of its fraudulent nature and with
10 specific intent to defraud.

11 And, third, that in execution of that scheme,
12 the defendant used or caused the use of interstate wires
13 as specified in the indictment.

14 First Element - Existence of a Scheme or
15 Artifice to Defraud.

16 The first element that the government must prove
17 beyond a reasonable doubt is that there was a scheme or
18 artifice to defraud the victim of money or property by
19 means of false or fraudulent pretenses, representations or
20 promises.

21 This first element is almost self-explanatory.
22 A "*scheme or artifice*" is merely a plan for the
23 accomplishment of an object. A scheme to defraud is any
24 plan, device, or course of action to obtain money or
25 property by means of false or fraudulent pretenses,

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1 representations or promises reasonably calculated to
2 deceive persons of average prudence.

3 *"Fraud"* is a general term which embraces all the
4 various means by which human ingenuity can devise and
5 which are resorted to by an individual to gain an
6 advantage over another by false representations,
7 suggestions or suppression of the truth, or deliberate
8 disregard for the truth.

9 Thus, a *"scheme to defraud"* is merely a plan to
10 deprive another of money or property by trick, deceit,
11 deception or swindle. The scheme in this case is alleged
12 to have been carried out by making false and fraudulent
13 statements and representations.

14 A statement, representation, claim, or document
15 is false if it is untrue when made and was then known to
16 be untrue by the person making it or causing it to be
17 made. A representation or statement is fraudulent if it
18 was falsely made with the intention to deceive.

19 Deceitful statements of half truths or the
20 concealment of material facts, and the expression of an
21 opinion not honestly entertained may also constitute false
22 or fraudulent statements under the statute. The
23 deception need not be premised upon spoken or written
24 words alone. The arrangement of the words, or the
25 circumstances in which they are used may convey the false

Court's Charge

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1 and deceptive appearance. If there is deception, the
2 manner in which it is accomplished is immaterial.

3 The failure to disclose information may also
4 constitute a fraudulent representation if the defendant
5 you are considering was under a legal, professional or
6 contractual duty to make such a disclosure, the defendant
7 actually knew such disclosure was required to be made, and
8 the defendant failed to make such disclosure with the
9 intent to defraud.

10 The false or fraudulent representation must
11 relate to a material fact or matter. A material fact is
12 one which would reasonably be expected to be of concern to
13 a reasonable and prudent person in relying upon the
14 representation or statement in making a decision (e.g.,
15 with respect to a proposed investment).

16 This means that if you find a particular
17 statement of fact to have been false, you must determine
18 whether that statement was one that a reasonable person or
19 investor might have considered important in making his or
20 her decision. The same principle applies to fraudulent
21 half truths or omissions of material facts.

22 The representations which the government charges
23 were made as part of the scheme to defraud are set forth
24 in paragraphs 5 through 15 and 21 through 27 of the
25 indictment.

Court's Charge

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1 It is not required that every misrepresentation
2 charged in the indictment be proved. It is sufficient if
3 the prosecution proves beyond a reasonable doubt that one
4 or more of the alleged material misrepresentations were
5 made in furtherance of the alleged scheme to defraud. The
6 jury must be unanimous on the alleged particular
7 misrepresentation that satisfies this element on each
8 count.

9 In addition to proving that a statement was
10 false or fraudulent and related to a material fact, in
11 order to establish a scheme to defraud, the government
12 must prove that the alleged scheme contemplated depriving
13 another of money or other property. However, the
14 government is not required to prove that a given defendant
15 personally originated the scheme to defraud.

16 Furthermore, it is not necessary for the
17 government to prove that the defendant actually realized
18 any gain from the scheme or that an intended victim
19 actually suffered any loss.

20 In this case it so happens that the government
21 does contend that the proof establishes that persons were
22 defrauded and that each defendant profited. Although
23 whether or not the scheme actually succeeded is really not
24 the question, you may consider whether it succeeded in
25 determining whether the scheme existed. A scheme to

Court's Charge

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defraud need not be shown by direct evidence, but may be established by all of the circumstances and facts in the case.

If you find that the government has proven beyond a reasonable doubt that a scheme to defraud, as charged, did exist, you next should consider the second element.

Second Element - Participation in Scheme with Intent.

The second element that the government must prove beyond a reasonable doubt is that the defendant you are considering participated in the scheme to defraud knowingly, willfully, and with specific intent to defraud.

"Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently.

"Willfully" means to act knowingly and purposely, with an intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

"Intent to defraud" means to act knowingly and with the specific intent to deceive, for the purpose of causing some financial or property loss to another.

The question of whether a person acted knowingly, willfully, and with intent to defraud is a

Court's Charge

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1 question of fact for you to determine, like any other fact
2 question. This question involves one's state of mind.

3 Direct proof of knowledge and fraudulent intent
4 is almost never available. It would be a rare case where
5 it could be shown that a person wrote or stated that as of
6 a given time in the past he committed an act with
7 fraudulent intent. Such direct proof is not required.

8 The ultimate facts of knowledge and criminal
9 intent, though subjective, may be established by
10 circumstantial evidence, based upon a person's outward
11 manifestations, his words, his conduct, his acts and all
12 the surrounding circumstances disclosed by the evidence
13 and the rational or logical inferences that may be drawn
14 from them.

15 Circumstantial evidence, if believed, is of no
16 less value than direct evidence. In either case, the
17 essential elements of the crime must be established beyond
18 a reasonable doubt.

19 Since an essential element of the crime charged
20 is intent to defraud, it follows that good faith on the
21 part of the defendant you are considering is a complete
22 defense to a charge of wire fraud.

23 Each defendant, however, has no burden to
24 establish a defense of good faith. The burden is on the
25 government to prove fraudulent intent and the consequent

Court's Charge

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1 lack of good faith beyond a reasonable doubt.

2 Under the wire fraud statute, even false
3 representations or statements, or omissions of material
4 facts, do not amount to a fraud unless done with
5 fraudulent intent. However misleading or deceptive a plan
6 may be, it is not fraudulent if it was devised or carried
7 out in good faith. An honest belief in the truth of the
8 representations made by a defendant is a complete defense,
9 however inaccurate the statements may turn out to be.

10 There is another consideration to bear in mind
11 in deciding whether or not the defendant acted in good
12 faith. You are instructed that if one of the defendants
13 participated in the scheme to defraud, then a belief by
14 that defendant, if such belief existed, that ultimately
15 everything would work out so that no one would lose any
16 money does not require a finding by you that the defendant
17 acted in good faith.

18 If the defendant participated in the scheme for
19 the purpose of causing some financial or property loss to
20 another, then no amount of honest belief on the part of
21 the defendant that the scheme would ultimately make a
22 profit for the investors will excuse fraudulent actions or
23 false representations by them.

24 As a practical matter, then, in order to sustain
25 the charges against each defendant, the government must

Court's Charge

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1 establish beyond a reasonable doubt that each defendant
2 knew that his conduct as a participant in the scheme was
3 calculated to deceive and, nonetheless, he associated
4 himself with the alleged fraudulent scheme for the purpose
5 of causing some loss to another.

6 Obviously, the fact that a defendant received
7 money, by itself, is insufficient to prove this element.
8 Instead, the government must prove this mental state that
9 I have just outlined.

10 The government may prove that the defendant you
11 are considering acted knowingly in either of two ways.

12 First, it is sufficient, of course, if the
13 evidence satisfies you beyond a reasonable doubt that the
14 defendant was actually aware he was making a false
15 statement or causing a false statement to be made.

16 Alternatively, in determining whether the
17 defendant acted knowingly, you can consider whether the
18 defendant you are considering deliberately closed his eyes
19 to what would otherwise have been obvious to him. For
20 example, if you find that the defendant was aware of a
21 high probability that a statement was false, and that he
22 deliberately sought to avoid knowledge of the statement's
23 falsity, you may infer that the defendant knew the
24 statement was false.

25 On the other hand, if you find that the

Court's Charge

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1 defendant actually, although mistakenly, believed that the
2 statement was true and that his conduct in making the
3 representation was lawful, even if you consider that
4 belief to be an unreasonable or irrational one, then the
5 requirement of knowledge would not be satisfied.

6 You may find that the defendant knew a
7 representation was false if you conclude beyond a
8 reasonable doubt that he made the representation with
9 deliberate disregard of whether it was true or false and
10 with a conscious purpose to avoid learning the truth.

11 If you find beyond a reasonable doubt that the
12 defendant acted with deliberate disregard for the truth,
13 the knowledge requirement would be satisfied unless the
14 defendant actually believed the statement to be true.

15 This guilty knowledge, however, cannot be established by
16 demonstrating mere negligence or foolishness on the part
17 of the defendant.

18 It is entirely up to you whether you find that
19 the defendant you are considering deliberately closed his
20 eyes and any inferences to be drawn from the evidence on
21 this issue.

22 In sum, to conclude on this element, if you find
23 that the defendant you are considering was not a knowing
24 participant in the scheme or that he lacked the specific
25 intent to defraud, you should find the defendant not

Court's Charge

6061

1 guilty.

2 On the other hand, if you find that the
3 government has established beyond a reasonable doubt not
4 only the first element, namely, the existence of the
5 scheme to defraud, but also this second element, that the
6 defendant was a knowing participant and acted with
7 specific intent to defraud, then you should then proceed
8 to consider the third element of wire fraud, as to that
9 defendant.

10 Third Element - Use of the Wires.

11 The third, and final, element that the
12 government must establish beyond a reasonable doubt is the
13 use of an interstate or international wire communication
14 in furtherance of the scheme to defraud.

15 The wire communication must pass between two or
16 more states. As, for example, a telephone call between
17 New York and New Jersey. Or it must pass between the
18 United States and a foreign country, such as a telephone
19 call between New York and London.

20 A wire communication also includes a wire
21 transfer of funds between banks in different states or
22 between a bank in the United States and a bank in a
23 foreign country.

24 The use of the wires need not, itself, be a
25 fraudulent representation. It must, however, further or

Court's Charge

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1 assist in the carrying out of the scheme to defraud.

2 It is not necessary for the defendant you are
3 considering to be directly or personally involved in the
4 wire communication, as long as the communication was
5 reasonably foreseeable in the execution of the alleged
6 scheme to defraud in which the defendant is accused of
7 participating.

8 In this regard, it is sufficient to establish
9 this element of the crime if the evidence justifies a
10 finding that the defendant you are considering caused the
11 wires to be used by others. This does not mean that the
12 defendant must specifically have authorized others to make
13 the call or transfer of funds.

14 When one does an act with knowledge that the use
15 of the wires will follow in the ordinary course of
16 business or where such use of the wires can reasonably be
17 foreseen, even though not actually intended, then he
18 causes the wires to be used.

19 The government contends that it was reasonably
20 foreseeable that the wires, including telephone calls,
21 facsimiles and emails, would be used in the ordinary
22 course of business to communicate with investors and
23 transfer the funds between banks, and therefore that each
24 defendant caused the use of the wires.

25 With respect to the use of the wires, the

Court's Charge

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1 government must establish beyond a reasonable doubt the
2 particular use charged in the indictment. However, the
3 government does not have to prove that the wires were used
4 on the exact date charged in the indictment. It is
5 sufficient if the evidence establishes beyond a reasonable
6 doubt that the wires were used on a date substantially
7 similar to the dates charged in the indictment.

8 I'm going to move to Count One, the wire fraud
9 conspiracy, but why don't we take a 15-minute break before
10 we do that.

11 Don't discuss the case yet.

12 (Whereupon, a recess was taken at 11:00 a.m.)

13 (Continued on the next page.)
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1 THE COURT: My practice with respect to the
2 alternates, I will hear any other suggestions, is to send
3 them home but to tell them not to read or listen to
4 anything regarding the case, not to discuss the case, with
5 the theory being if, for some reason, we lost a juror,
6 theoretically you could call one of them in and tell the
7 jury start over again.

8 I think the law permits that. I have never
9 actually done that, but that's going to be my intention.
10 I think some judges keep them in a separate room or keep
11 them at the courthouse. I think it's cruel and unusual
12 punishment.

13 MR. LaRUSSO: It is.

14 MR. HALEY: I think it's an inventive solution,
15 your Honor.

16 THE COURT: Everybody okay with that?

17 MR. MISKIEWICZ: Yes.

18 MR. LaRUSSO: Yes.

19 MR. HALEY: Yes.

20 THE COURT: Let's bring in the jury.

21 (The jury enters the courtroom.)

22 THE COURT: Please be seated.

23 Members of the jury, we are now moving to Count
24 One, the Wire Fraud Conspiracy.

25 Count One of the indictment charges the

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1 defendants with Conspiracy to Commit Wire Fraud. The
2 indictment charges that the defendants conspired to devise
3 a scheme to defraud that used the interstate wires. Count
4 One, in relevant part, reads as follows:

5 In or about and between August 2002 and April
6 2013, both dates being approximate and inclusive, within
7 the Eastern District of New York and elsewhere, the
8 defendants Phillip a. Kenner, also known as Philip A.
9 Kenner -- with one L -- and Tommy C. Constantine, together
10 with others, did knowingly and intentionally conspire to
11 devise a scheme and artifice to defraud the investors and
12 to obtain money and property from them by means of
13 materially false and fraudulent pretenses, representations
14 and promises, and for the purpose of executing such scheme
15 and artifice, did transmit and cause to be transmitted by
16 means of wire communication in interstate and foreign
17 commerce, writings, signs, signals, pictures and sounds,
18 contrary to Title 18, United States Code, Section 1343.

19 The relevant statute on this subject is 18
20 U.S.C. Section 1349. It provides, I'm quoting from the
21 statute:

22 Any person who conspires to commit any offense
23 under this chapter shall be subject to the same penalties
24 as those prescribed for the offense, the commission of
25 which was the object of the conspiracy.

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1 A conspiracy is a kind of criminal partnership,
2 an agreement or understanding by two or more persons to
3 violate another law. A conspiracy to commit a crime is an
4 entirely separate and different offense from the
5 underlying crime a conspirator is charged with agreeing to
6 commit. That is because the existence of a conspiracy, or
7 partnership for criminal purposes, is, in and of itself, a
8 crime.

9 The essence of the crime of conspiracy is the
10 agreement or understanding among two or more persons that
11 they will act together to violate the law. Thus, if a
12 conspiracy exists, even if it should fail to achieve its
13 purpose, it is still punishable as a crime. Consequently,
14 for a defendant to be guilty of conspiracy, there is no
15 need for the government to prove that he or any other
16 conspirator actually succeeded in their criminal goals or
17 even that they could have succeeded.

18 Congress has deemed it appropriate to make
19 conspiracy, standing alone, a separate crime, even if the
20 conspiracy is not successful.

21 This is because collective criminal activity
22 poses a greater threat to the public's safety and welfare
23 than individual conduct, and increases the likelihood of
24 success of a particular criminal venture.

25 In order to prove the crime of conspiracy, the

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1 government must establish the following three elements of
2 the crime beyond a reasonable doubt.

3 First, that two or more persons entered into the
4 particular unlawful agreement charged in the indictment.

5 Second, that the objective of the conspiracy was
6 to commit at least one of the unlawful acts charged in the
7 indictment and.

8 Third, that the defendant knowingly,
9 intentionally and willfully became a member of the
10 conspiracy.

11 Let me discuss these in more detail with you.
12 The first element, the Existence of the Agreement.

13 First, the government must prove beyond a
14 reasonable doubt that two or more persons entered into the
15 unlawful agreement charged in the indictment. In other
16 words, one cannot commit the crime of conspiracy alone.
17 Rather, the proof must convince you that at least two
18 persons joined together in a common criminal scheme.

19 Now, the government need not prove that members
20 of the conspiracy met together or entered into any express
21 or formal agreement. You need not find that the alleged
22 conspirators stated, in words or writing, what the scheme
23 was, its object or purpose, or the means by which it was
24 to be accomplished. It is sufficient to show that the
25 conspirators implicitly came to a mutual understanding to

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1 accomplish one or more of the unlawful objectives charged
2 in the indictment by means of a joint plan or common
3 design.

4 You may, of course, find that the existence of
5 an agreement between two or more persons to engage in
6 criminal conduct has been established by direct proof.
7 But since a conspiracy is, by its very nature,
8 characterized by secrecy, direct proof may not be
9 available. You may, therefore, infer the existence of a
10 conspiracy from the circumstances of this case and the
11 conduct of the parties involved. In a very real sense,
12 then, in the context of conspiracy cases, actions often
13 speak louder than words. You may, in determining whether
14 an agreement existed here, consider the actions and
15 statements of those you find to be conspirators as proof
16 that a common design existed to act together for the
17 accomplishment or the unlawful purposes stated in the
18 indictment.

19 The Second Element: Unlawful Acts.

20 The second element that the government must
21 prove beyond a reasonable doubt is that the objective of
22 the conspiracy was to commit at least one of the unlawful
23 acts charged in the indictment.

24 The conspiracy charged in Count One of the
25 indictment has alleged more than one objective, that is,

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1 it alleges multiple ways in which the members conspired to
2 execute a scheme to defraud Investors.

3 The three crimes alleged to be an object of the
4 conspiracy in Count One involve wire fraud: The first is
5 the alleged scheme to defraud investors related to the
6 Hawaii Land Developments, the second is the alleged scheme
7 to defraud investors related to the Eufora Investments,
8 and the third is the alleged scheme to defraud investors
9 related to the Global Settlement Fund. I instructed you
10 on the elements of wire fraud earlier when I instructed
11 you about Counts Two through Eight, and those elements and
12 instructions apply equally to this count.

13 So I'm not going to repeat those instructions,
14 but they apply equally to this count as well.

15 The government need not prove that the alleged
16 conspirators entered into an agreement to accomplish all
17 three of the unlawful objectives alleged. If you find
18 unanimously that two or more persons agreed to commit any
19 of these three objectives, then this element would be
20 proved. That is, it is not enough to convict if some of
21 you find that the government has proven only an agreement
22 to accomplish one unlawful objective while others of you
23 find that the government has proven only an agreement to
24 accomplish a different unlawful objective. Thus, you must
25 be unanimous as to the particular unlawful objective.

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1 Moving to the Third Element: Membership in the
2 Conspiracy.

3 The third element the government must prove
4 beyond a reasonable doubt is that the defendant you are
5 considering knowingly, intentionally and willfully became
6 a member of the charged conspiracy. I have explained to
7 you in some detail what it means to act knowingly and
8 intentionally and willfully. Follow those instruction
9 here.

10 Again, I'm not repeating them, but you should
11 follow the instructions here. If you are satisfied that
12 the conspiracy charged in the indictment existed, you must
13 ask yourselves who the members of that conspiracy were.
14 In deciding whether each defendant was a member of the
15 conspiracy, you should consider whether he knowingly,
16 intentionally and willfully joined the conspiracy. Did
17 the defendant participate in it with knowledge of its
18 unlawful purpose and with the intention of furthering the
19 objectives with which he is charged?

20 In order for a defendant to be deemed a
21 participant in a conspiracy, he must have had a stake in
22 the venture or its outcome. You are instructed that while
23 proof of a financial interest in the outcome of a scheme
24 is not essential, if you find that the defendant had such
25 an interest, that is a factor which you may consider in

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1 determining whether or not the defendant was a member of
2 the conspiracy charged in the indictment.

3 Before the defendant you are considering can be
4 found to have been a conspirator, you must find that he
5 knowingly joined in the unlawful agreement or plan.

6 The key question, therefore, is whether the
7 defendant joined the conspiracy with an awareness of the,
8 of at least some of the basic aims and purposes of the
9 unlawful agreement.

10 I want to stress that merely being present at a
11 place where criminal conduct is underway does not make a
12 person a member of a conspiracy to commit the crime. This
13 is true even if the person knows that a crime is being
14 committed. Mere innocent association, as for social and
15 business purposes, or physical contact with conspirators,
16 does not make a person a co-conspirator. Similarly, the
17 fact that a person without any knowledge that a crime is
18 being committed, merely happens to act in a way that
19 furthers the purposes or objectives of the conspiracy does
20 not make that person a member. More is required under the
21 law.

22 The extent of the defendant's participation in a
23 conspiracy has no bearing on the issue of guilt. Each
24 member of a conspiracy may perform separate and distinct
25 acts and may perform them at different times. Some

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1 conspirators may play major roles, while others play minor
2 parts in the scheme. A conspirator need not have been
3 fully informed as to all the details or the scope of the
4 conspiracy. He need not have been a member of the
5 conspiracy for the entire time of its existence.

6 I will now give you an instruction on the
7 statute of limitations.

8 Finally, there is an additional requirement that
9 the government must prove with respect to the conspiracy
10 charged in Count One. In particular, there is a limit on
11 how much time government has to obtain an indictment.
12 Therefore, for you to find either defendant guilty of
13 conspiracy, the government must prove beyond a reasonable
14 doubt that the conspiracy continued after October 29,
15 2008.

16 I'm now going to give you an aiding and -- I
17 finished Count One. I'm now going to give you what's
18 called an aiding and abetting instruction. This relates
19 to only Counts Two through Six.

20 For Counts Two through Six, the government can
21 meet its burden of proof either by proving that the
22 defendant did the acts charged himself or by proving that
23 he aided and abetted another person in doing so. The
24 government is relying on two theories of aiding and
25 abetting under Section 2 of Title 18 of the United States

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1 Code. You may find that the defendant was an aider and
2 abettor under either theory, that is you may find that the
3 defendant was an aider and abettor under either Section
4 2(a) or 2(b) of Title 18 of the United States Code, which
5 reads as follows -- this is 2(a):

6 Whoever commits an offense against the United
7 States or aids, abets, counsels, commands, induces or
8 procures its commission, is punishable as a principal.

9 And now quoting Section 2(b):

10 Whoever willfully causes an act to be done,
11 which if directly performed by him or another would be an
12 offense against the United States, is punishable as a
13 principal.

14 Accordingly, even if the defendant you are
15 considering did not personally do every act constituting
16 an offense, you may find that he committed that offense if
17 the government proves beyond a reasonable doubt that he
18 aided and abetted the offense.

19 A person who aids or abets another to commit an
20 offense is just as guilty of that offense as if he
21 personally committed it. The essence of aiding and
22 abetting is the intentional and knowing participation in
23 the unlawful act by furthering it in some way.

24 To find that a given defendant is an aider or
25 abettor, you must find beyond a reasonable doubt that the

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1 government has proven that another person actually
2 committed the crime with which the defendant is charged,
3 and that the defendant aided and abetted that person in
4 the commission of the offense.

5 In order to aid or abet another to commit a
6 crime, it is necessary that a defendant willfully and
7 knowingly associate himself in some way with the criminal
8 venture, that he participate in it out of desire to make
9 the crime succeed. That is, a defendant must have the
10 specific intent of furthering the criminal offense through
11 some action on his part. I previously instructed you on
12 the definitions of willfully and knowingly and you should
13 apply those instructions here.

14 The mere presence of the defendant where a crime
15 is being committed, even coupled with knowledge that a
16 crime is being committed, or the mere acquiescence by the
17 defendant in the criminal conduct of others, even with
18 guilty knowledge, is not sufficient to establish aiding
19 and abetting. An aider and abettor must have some
20 interest in the criminal venture. That interest need not
21 be a financial one, but you may consider the presence or
22 absence of the financial interest in making your
23 determination.

24 In other words, if one, fully aware of what he
25 is doing, plays a significant role in facilitating a

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1 transaction prohibited by law, he is equally guilty with
2 the person who directly performs the illegal acts, even
3 though the latter played a much greater or major part in
4 the preparation of the crimes.

5 To determine whether the defendant you are
6 considering aided and abetted the commission of the crime
7 charged, ask yourselves these questions:

8 First, did he participate in the crime charged
9 as something he wished to bring about?

10 Second, did he associate himself with the
11 criminal venture knowingly and willfully?

12 Third, did he seek by his actions to make the
13 criminal venture succeed?

14 If he did, then the defendant is an aider and
15 abettor and is therefore guilty of the crime charged, just
16 as if he himself had actually committed it. If, on the
17 other hand, your answers to any of these questions is no,
18 then the defendant is not an aider and abettor under 18
19 U.S.C. Section 2(a), and you must find him not guilty of
20 the crime under considerations an aider and abettor under
21 Section 2(a).

22 Under Section 2(b), you may also find that a
23 defendant is an aider and abettor if you find that the
24 government has proven beyond a reasonable doubt that he
25 knowingly and intentionally caused another person to

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1 engage in wire fraud, as I have defined that for you, and
2 that, in doing so, the defendant acted willfully, with the
3 purpose and specific intent of causing that other person
4 to engage in wire fraud.

5 I'm now going to give you what is called a
6 Pinkerton Charge, which is the name of the case that this
7 charge is based upon. Again, it applies only to Counts
8 Two through Six.

9 For Counts Two through Six, which charge both
10 defendants with wire fraud, if you do not find that the
11 government has satisfied its burden of proving that the
12 defendant you are considering is guilty as an aider and
13 abettor or as a principal, there is another method by
14 which you may evaluate the defendant's possible guilt on
15 these counts.

16 If you find, beyond a reasonable doubt, that the
17 defendant you are considering was a member of a conspiracy
18 to commit wire fraud, as charged in Count One of the
19 indictment, then you may also, but you are not required
20 to, find that the defendant guilty of the substantive
21 crimes related to that conspiracy, as charged in Counts
22 Two through Six, provided you find, beyond a reasonable
23 doubt, each of the following elements for the particular
24 count you are considering.

25 First, that the substantive crime charged in the

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1 count you are considering was committed.

2 Second, that the person or persons who committed
3 that substantive crime were members of the corresponding
4 conspiracy to commit wire fraud as charged in Count One.

5 Third, that the substantive crime charged in the
6 count you are considering was committed pursuant to a
7 common plan and understanding you found to exist among the
8 conspirators.

9 Fourth, that the defendant was a member of that
10 conspiracy at the time the substantive crime was
11 committed;

12 Fifth, that the defendant could reasonably have
13 foreseen that the substantive crime you are considering
14 might be committed by his co-conspirators. An offense by
15 a co-conspirator is deemed to be reasonably foreseeable if
16 it is a necessary or natural consequence of the unlawful
17 agreement.

18 If the government has proven all five of these
19 elements beyond a reasonable doubt for the specific
20 substantive crime you are considering, then you may find
21 the defendant you are considering guilty of the
22 substantive crime, even if the defendant did not
23 participate in the acts constituting the substantive
24 crime.

25 The reason for this rule is simply that a

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1 co-conspirator who commits a substantive crime pursuant to
2 a conspiracy is deemed to be the agent of the other
3 co-conspirators. Therefore, all of the co-conspirators
4 must bear criminal responsibility for the commission of
5 the foreseeable substantive crimes.

6 If, however, you are not satisfied as to the
7 existence of any of these five elements, then you may not
8 find the defendant you are considering guilty of the
9 substantive crime charged in the count that you are
10 considering. I again remind you that this instruction
11 relates only to Counts Two through Six, and, therefore,
12 does not apply to any other counts in the indictment.

13 Moving to Count Nine: The Money Laundering
14 Conspiracy charge.

15 Count Nine alleges that the defendants entered
16 into a conspiracy to commit substantive offense of money
17 laundering in violation of Title 18, United States Code,
18 Section 1956(h). Count Nine reads, in relevant part, as
19 follows:

20 In or about and between August 2002 and April
21 2013, both dates being approximate and inclusive, within
22 the Eastern District of New York and elsewhere, defendants
23 PHILLIP A. KENNER, also known as "Philip A. Kenner" --
24 with one L -- and TOMMY C. CONSTANTINE, together with
25 others, did knowingly and intentionally conspire to

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1 conduct one or more financial transactions in and
2 affecting interstate commerce, to wit; wire transfers of
3 money, which transactions in fact involved the proceeds of
4 specified unlawful activity, to wit; wire fraud and
5 conspiracy to commit wire fraud in violation of Title 18,
6 United States Code, Sections 1343 and 1349, respectively,
7 knowing that the property involved in the transactions
8 represented the proceeds of some form of unlawful
9 activity, and knowing that the transactions were designed
10 in whole and in part to conceal and disguise the nature,
11 the location, the source, the ownership and the control of
12 the proceeds of the specified unlawful activity, contrary
13 to Title 18, United States Code, Section 1956(a)(1)(B)(i).
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1 Count Nine alleges that the defendants entered
2 into a conspiracy to commit the substantive offense of
3 money laundering in violation of Title 18 United States
4 Code Section 1956(h). Count Nine reads in relevant part
5 as follows:

6 In or about and between August 2002 and April
7 2013, both dates being approximate and inclusive, within
8 the Eastern District of New York and elsewhere, defendants
9 Phillip A. Kenner, also known as Philip A. Kenner, one L,
10 and Tommy C. Constantine, together with others, did
11 knowingly and intentionally conspire to conduct one or
12 more financial transactions in and affecting interstate
13 commerce, to wit, wire transfers of money which
14 transactions in fact involved the proceeds of specified
15 unlawful activity to which wire fraud and conspiracy to
16 commit wire fraud in violation of Title 18, United States
17 Code Sections 1343 and 1349, respectively, knowing that
18 the property involved in the transactions represented the
19 proceeds of some form of unlawful activity and knowing
20 that the transactions were designed in whole and in part
21 to conceal and disguise the nature, the location, the
22 source, the ownership and the control of the proceeds of
23 the specified unlawful activity, contrary to Title 18,
24 United States Code Section 1956 (a)(1)(B)(i).

25 Count Nine of the indictment charges the

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1 defendants with violating Section 1956(h) of Title 18 of
2 the United States Code. Section 1956(h) provides in
3 relevant part:

4 Any person who conspires to commit any offense
5 defined in this section shall be subject to the same
6 penalties as those prescribed for the offense the
7 commission of which was the object of the conspiracy.

8 Section 1956 of Title 18, United States Code,
9 deals with participation in a financial transaction that
10 involves property constituting the proceeds of specified
11 unlawful activity. Specifically, Section 1956
12 (a)(1)(B)(i) provides, quoting the statute:

13 Whoever, knowing that the property involved in a
14 financial transaction represents the proceeds of some form
15 of unlawful activity, conducts or attempts to conduct such
16 a financial transaction which in fact involves the
17 proceeds of specified unlawful activity, knowing that the
18 transaction is designed in whole or in part to conceal or
19 disguise the nature, the location, the source or the
20 ownership or the control of the proceeds of specified
21 unlawful activity is guilty of a crime.

22 I have already explained the law of conspiracy
23 to you in connection with Count One of the indictment and
24 those instructions apply equally to Count Nine. Thus, in
25 order to prove the crime of money laundering conspiracy

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1 charged in Count Nine, the government must establish the
2 following elements of the crime beyond a reasonable doubt:

3 First, that two or more persons entered into a
4 particular unlawful agreement charged in the indictment;

5 Second, that the objective of the conspiracy was
6 to commit the money laundering objective alleged in the
7 indictment;

8 And third, that the defendant you are
9 considering knowingly, intentionally and willfully became
10 a member of the conspiracy.

11 The detailed instructions that I gave you on
12 each of the elements of conspiracy on Count One apply
13 equally here even though I will not repeat them.

14 In terms of the objective of the money
15 laundering conspiracy, Count Nine charges the defendants
16 with entering into a money laundering conspiracy knowing
17 that the transactions were designed in whole or in part to
18 conceal and disguise the nature, location, source,
19 ownership and control of the proceeds of specified
20 unlawful activity, namely, wire fraud or conspiracy to
21 commit wire fraud. I will now give you additional
22 instructions regarding the elements of the money
23 laundering under Section 1956(a)(1)(B)(i).

24 In order to prove the crime of money laundering
25 in violation of Section 1956(a)(1)(B)(i) on Count Nine,

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1 the government must establish beyond a reasonable doubt
2 each of the following elements:

3 First, that the defendant you are considering
4 conducted or attempted to conduct a financial transaction
5 involving property constituting the proceeds of specified
6 unlawful activity, namely wire fraud or conspiracy to
7 commit wire fraud;

8 Second, that the defendant knew that the
9 property involved in the financial transaction was the
10 proceeds of some form of unlawful activity;

11 Third, that the defendant knew that the
12 transaction was designed in whole or in part either to
13 conceal or disguise the nature, location, source,
14 ownership or control of the proceeds of specified unlawful
15 activity.

16 I will give you some additional instructions on
17 each of those elements.

18 The first element, financial transaction
19 involving proceeds of unlawful activity.

20 The first element which the government must
21 prove beyond a reasonable doubt is that the defendant that
22 you are considering conducted or attempted to conduct a
23 financial transaction involving property constituting the
24 proceeds of specified unlawful activity, namely wire fraud
25 or conspiracy to commit wire fraud. A number of these

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1 terms require definition.

2 The term "conducts" includes initiating,
3 concluding or participating in initiating or concluding a
4 transaction.

5 A "transaction" includes a purchase, sale, loan,
6 pledge, gift, transfer, delivery or other disposition of
7 property.

8 The term "financial transaction" means a
9 transaction involving a financial institution which is
10 engaged in or the activities of which affect interstate or
11 foreign commerce in any way or degree affects interstate
12 or foreign commerce and involves the movement of funds by
13 wire or other means, or involves one or more monetary
14 instruments, or involves the transfer of title of any real
15 property, vehicle, vessel or aircraft.

16 A "transaction involving a financial
17 institution" includes a deposit, withdrawal, transfer
18 between accounts, exchange of currency, loan, extension of
19 credit, purchase or sale of any stock, bond, certificate
20 of deposit or other monetary instrument, use of a safe
21 deposit box or any other payment, transfer or delivery by,
22 through or to a financial institution by whatever means.

23 The term "interstate or foreign commerce" means
24 commerce between any combination of states, territories or
25 possessions of the United States or between the United

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1 States and a foreign country.

2 The term "monetary instrument" includes, among
3 other things, coin or currency of the United States or any
4 other country, personal checks, traveler's checks,
5 cashier's checks, bank checks, money orders and investment
6 securities or negotiable instruments in bearer form or
7 otherwise in such form that title thereto passes upon
8 delivery.

9 The term "proceeds" means any property or any
10 interest in property that someone acquires or retains as
11 profits resulting from the commission of the specified
12 unlawful activity. Proceeds can be any kind of property,
13 not just money. However, in order to be considered
14 proceeds of specific unlawful activity, the property must
15 represent the profits of the underlying crime, not just
16 its gross revenue. In other words, "proceeds" means net
17 profits derived from a crime and not simply money that was
18 received during the course of the commission of a crime.
19 If a person uses the money derived from a crime to defray
20 the expenses of that same crime, you cannot find that he
21 or she was using profits to do so. Until a person pays
22 the expenses of his or her crime, there are no profits.
23 Also, the illegal laundering of funds described here
24 cannot occur in the same financial transaction through
25 which those funds first became tainted by a crime. The

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1 government has the burden of proving beyond a reasonable
2 doubt that the funds involved in each of the financial
3 transactions alleged in the indictment constituted the
4 "proceeds of specified unlawful activity" as opposed to
5 being funds derived from some other source.

6 The term "specified unlawful activity" means any
7 one of a variety of offenses defined by the statute. In
8 this case the government has alleged that the funds in
9 question were the proceeds of wire fraud and conspiracy to
10 commit wire fraud. I instruct you that, as a matter of
11 law, wire fraud and wire fraud conspiracy fall within that
12 definition. However, it is for you to determine whether
13 the funds were the proceeds of that unlawful activity. A
14 few moments ago I explained the elements of wire fraud and
15 those apply here.

16 The second element, knowledge that property was
17 proceeds of unlawful activity. The second element which
18 the government must prove beyond a reasonable doubt is
19 that the defendant you are considering knew that the
20 property involved in the financial transaction was the
21 proceeds of some form of unlawful activity.

22 To satisfy this element, the government must
23 prove that the defendant knew that the property involved
24 in the transaction represented proceeds from some form,
25 though not necessarily which form, of activity that

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1 constitutes a felony under state, federal or foreign law.

2 Thus, the government does not have to prove that the
3 defendant specifically knew that the property involved in
4 the transaction represented the profits of the wire fraud
5 or any other specific offense. The government only has to
6 prove that the defendant knew it represented some illegal
7 activity which was a felony. I instruct you as a matter
8 of law that wire fraud and conspiracy to commit wire fraud
9 are felonies under federal law.

10 The third element, knowledge the transaction was
11 designed to conceal origin of property.

12 The third element which the government must
13 prove beyond a reasonable doubt is that the defendant that
14 you are considering acted with knowledge that the
15 transaction was designed to conceal or disguise the
16 nature, location, source, ownership, or control of the
17 proceeds of specified unlawful activity, namely wire fraud
18 or conspiracy to commit wire fraud.

19 If you find that the evidence establishes beyond
20 a reasonable doubt that the defendant knew of the purpose
21 of the particular transaction in issue, and that he knew
22 that the transaction was either designed to conceal or
23 disguise the true origin of the property in question, then
24 this element is satisfied.

25 However, if you find that the defendant knew of

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1 the transaction but did not know that it was either
2 designed to conceal or disguise the true origin of the
3 property in question but instead thought that the
4 transaction was intended to further an innocent
5 transaction, you must find that this element has not been
6 satisfied and find the defendant not guilty.

7 I will now give you a statute of limitations
8 instruction as relates to the conspiracy to commit money
9 laundering charge in Count Nine.

10 Finally, there is an additional requirement that
11 the government must prove with respect to the conspiracy
12 charge in Count Nine. In particular, there is a limit on
13 how much time the government has to obtain an indictment.
14 Therefore, for you to find either defendant guilty of
15 conspiracy, the government must prove beyond a reasonable
16 doubt that the conspiracy continued after October 29,
17 2008.

18 That concludes the instructions for Count Nine.

19 I will now give you a venue instruction. This
20 instruction relates to all the counts.

21 In addition to the foregoing elements of the
22 offenses for each offense you must consider whether any
23 act in furtherance of the crime occurred within the
24 Eastern District of New York.

25 You are instructed that the Eastern District of

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1 New York encompasses the boroughs of Brooklyn, Queens and
2 Staten Island as well as Nassau and Suffolk Counties on
3 Long Island.

4 In this regard, the government need not prove
5 that the crimes themselves were committed in this district
6 or that the defendants themselves were present here. It
7 is sufficient to satisfy this element if any act in
8 furtherance of the crimes occurred within this district.
9 Venue for the conspiracy charges may be properly found in
10 any district where the unlawful agreement was formed or
11 where an overt act was committed in furtherance of the
12 conspiracy. If you find that the government has failed to
13 prove that any act in furtherance of a crime occurred
14 within this district, then you must acquit on the count
15 you are considering.

16 The government must prove by a preponderance of
17 the evidence. That means that the evidence must show with
18 respect to each count that it is more likely than not that
19 venue is properly in the Eastern District of New York.

20 I want to emphasize what is referred to as the
21 preponderance of the evidence standard only applies to the
22 issue of venue. As you know, the standard for everything
23 else in the case, the burden is on the government beyond a
24 reasonable doubt. So this preponderance standard only
25 applies on the issue of venue, no other issue in the case.

COURT'S CHARGE

6090

1 Every other issue the government's burden is beyond a
2 reasonable doubt.

3 Okay, Part III, the rules regarding
4 deliberations. You will be very happy to hear this
5 section is much shorter than Part II. We have about
6 another ten minutes or so.

7 Finally, a few closing remarks.

8 Keep in mind that nothing I have said in these
9 instructions is intended to suggest to you in any way what
10 I think your verdict should be. That is entirely for you
11 to decide.

12 By way of reminder, I charge you once again that
13 it is your responsibility to judge the facts in this case
14 only from the evidence presented during the trial and to
15 apply the law as I have given it to you to the facts as
16 you find them from the evidence.

17 I instruct you that the decision you reach as to
18 each element for each charge in the indictment must be
19 unanimous, that is, all 12 of you must agree on every
20 element in every count. I also instruct you to consider
21 each count of the indictment in which each defendant is
22 charged separately. For example, you may find a defendant
23 guilty of one count and not guilty of another or you may
24 find him guilty of all counts or not guilty of any. But
25 again, the verdict on each element and each count must be

COURT'S CHARGE

6091

1 unanimous.

2 Moreover, you must consider each defendant
3 separately on each count and your verdict as to each
4 defendant on each count must be unanimous.

5 When you retire, it is your duty to discuss the
6 case for the purpose of reaching a verdict. Each of you
7 must decide the case for yourself but should only do so
8 after considering all of the evidence, listening to the
9 views of your fellow jurors and discussing it fully. It
10 is important that you reach a verdict if you can do so
11 conscientiously.

12 You should not hesitate to reconsider your
13 opinions from time to time and to change them if you are
14 convinced that they are wrong. However, do not surrender
15 an honest conviction as to weight and effect of the
16 evidence simply to arrive at a verdict.

17 Remember also that your verdict must be based
18 solely on the evidence in the case and the law as the
19 Court has given it to you, not on anything else.
20 Opening statements, closing arguments or other statements
21 or arguments of counsel are not evidence. If your
22 recollection of the facts differs from the way counsel has
23 stated the facts to be, then your recollection controls.

24 And finally, bear in mind that the government
25 has the burden of proof and that you must be convinced of

COURT'S CHARGE

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1 the defendant's guilt beyond a reasonable doubt to return
2 a guilty verdict. If you find that this burden has not
3 been met, you must return a verdict of not guilty.

4 The question of possible punishment of the
5 defendants is of no concern to the jury and should not in
6 any sense enter into or influence your deliberations. The
7 duty of imposing sentence rests exclusively upon the
8 Court. Your function is to weigh the evidence in the case
9 and to determine whether or not the defendant is guilty
10 beyond a reasonable doubt, solely upon the basis of such
11 evidence.

12 Under your oath as jurors, you cannot allow a
13 consideration of the punishment which may be imposed upon
14 the defendants, if they are convicted, to influence your
15 verdict in any way or in any sense enter into your
16 deliberations.

17 Under your oath as jurors you are not to be
18 swayed by sympathy for one side or the other. You are to
19 be guided solely by the evidence in this case and the
20 crucial question that you must ask yourselves as you sift
21 through the evidence is: Has the government proven the
22 guilt of each defendant beyond a reasonable doubt?

23 It is for you alone to decide whether the
24 government has proven that one or both of the defendants
25 are guilty of the crimes charged solely on the basis of

COURT'S CHARGE

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1 the evidence and subject to the law as I charge you. It
2 must be clear to you that once you let fear, prejudice,
3 bias or sympathy interfere with your thinking, there is a
4 risk that you will not arrive at a true and just verdict.

5 If you have a reasonable doubt as to a
6 defendant's guilt, you must find a verdict of acquittal.
7 But on the other hand, if you should find that the
8 government has met its burden of proving a defendant's
9 guilt beyond a reasonable doubt, you must not hesitate to
10 because of sympathy or any other reason render a verdict
11 of guilty.

12 When you get into the jury room, before you
13 begin your deliberations, your first act will be to select
14 one of you to be the foreperson. The foreperson will be
15 responsible for signing all communications to the Court
16 and for handing them to the court security officer during
17 your deliberations. But, of course, his or her vote is
18 entitled to no greater weight than any other juror.

19 During the trial, I permitted the taking of
20 notes by those of you who wished to do so. At that time I
21 pointed out that while you could take notes, there is no
22 need for your doing so because the court reporter takes
23 down everything that is said in the courtroom and during
24 the deliberations the court reporter will read back to you
25 any portion of the transcript you may ask for.

COURT'S CHARGE

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1 For those of you who did take notes during the
2 trial, I point out to you and your fellow jurors that your
3 notes are simply an aid to memory for the particular juror
4 who takes the notes. You are instructed that your notes
5 are only a tool to aid in your own individual memory and
6 you should not compare your notes with other jurors in
7 your deliberations. Jurors who did not take notes should
8 not be influenced by the fact that other jurors have taken
9 notes. Your notes are not evidence, may be inaccurate and
10 are by no means a complete recording of the trial
11 testimony. Any difference between a juror's recollection
12 and another juror's notes should be settled by asking to
13 have the court reporter to read back the transcript for it
14 is the court record rather than any juror's notes upon
15 which the jury must base its determination of the facts
16 and its verdict.

17 It is very important that you not communicate
18 with anyone outside the jury room about your deliberations
19 or about anything touching this case. There is only one
20 exception to this rule. If it becomes necessary during
21 your deliberations to communicate with me, you may send a
22 note through the court security officer signed by your
23 foreperson or by one or more members of the jury. No
24 member of the jury should ever attempt to communicate with
25 me except by a signed writing and I will never communicate

COURT'S CHARGE

6095

1 with any member of the jury on any subject touching the
2 merits of the case other than in writing or orally here in
3 open court.

4 If you send any notes to the Court, do not
5 disclose anything about your deliberations. Specifically,
6 do not disclose to anyone, not even to me, how the jury
7 stands numerically or otherwise on the question of the
8 guilt or innocence of the defendants until after you have
9 reached a unanimous verdict or have been discharged.

10 If during your deliberations you want to see any
11 of the exhibits, they will be sent to you in the jury room
12 upon written request. If you want any of the testimony
13 read -- obviously, if you ask for a recording, we will
14 bring you in the courtroom and play the recording for you.
15 If you want any of the testimony read, that can also be
16 done. But please remember that it is not always easy to
17 locate what you might want so be as specific as you
18 possibly can in requesting exhibits or portions of the
19 testimony which you may want. If you request a read back
20 of testimony, please be patient as it may take some time
21 to locate and agree upon the specific testimony required.

22 I have prepared a verdict sheet which will be
23 given to you. The verdict sheet is given to you to record
24 your verdict after you have reached a verdict as to all
25 counts in the indictment.

COURT'S CHARGE

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1 When you have reached a decision, have the
2 foreperson sign the verdict form and put the date on it
3 and notify the Marshal by note that you have reached a
4 verdict.

5 I reiterate that any verdict you reach must be
6 unanimous.

7 Your oath sums up your duty, that is, without
8 fear or favor to any person you will well and truly try
9 the issues in this case according to the evidence given to
10 you in court and the laws of the United States.

11 This concludes my instructions.

12 Thank you for your close and careful attention.
13 And in a minute, after I speak to the lawyers, you will
14 retire to deliberate, after I swear in the Marshal.

15 I do ask as your first order of business that
16 you elect a foreperson and send me a note dated and timed
17 identifying that foreperson.

18 May I speak to the lawyers at sidebar.

19 (Continued on the next page.)
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Sidebar

6097

1 (Sidebar.)

2 THE COURT: There were a couple of typos I
3 caught orally. We can make those changes in case they
4 request a written copy.

5 Anything else?

6 MR. MISKIEWICZ: No, your Honor.

7 MR. LaRUSSO: No, Judge.

8 MR. HALEY: No, Judge.

9 (Sidebar concluded.)

10 (Continued on the next page.)

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1 (In open court.)

2 THE COURT: I will ask the court security
3 officer to step forward for the oath; Phil.

4 (Court security officer sworn.)

5 THE COURT: At this point, it's my
6 responsibility to excuse the alternate jurors but I want
7 to do so with the following instruction. I'm going to ask
8 that until you get a call from us that the jury has
9 completed its deliberation and the case is over, I will
10 ask you not read or listen to anything regarding the case
11 or discuss the case with anyone, that is, because if for
12 whatever reason, I don't expect this to happen, one of the
13 12 jurors is unable to complete deliberations, as long as
14 you continue to follow my instructions, the law allows me
15 to call you back in to participate and deliberate in the
16 case.

17 So I'm going to ask you to continue to follow
18 those instructions until you get a call from Michele or
19 someone from the jury office that the case is over.

20 Obviously, you don't have to sit by the phone.
21 You can go about your daily lives. But please continue to
22 follow that instruction.

23 The next thing, I want to thank you both for
24 your service in this case as jurors. I really appreciate
25 your willingness to serve and your service.

6099

1 Your lunch is not coming until 12:30. If you
2 want to wait downstairs in the Central Jury Room, Michele
3 will bring the lunch to you.

4 I will ask that the two alternate jurors go in
5 the jury room and collect their stuff and then I will send
6 the other 12 back.

7 (The alternate jurors leave the courtroom.)

8 THE COURT: In terms of the two documents that
9 will go back with you, I will ask my law clerk to hand
10 them to juror number 1. We will mark them as -- when I
11 don't have Michele, I don't know what letter we are up to.
12 We will call them G and H.

13 G will be the verdict sheet that you record your
14 verdict on. As you will see, it's self explanatory,
15 divided up by count and defendant. Your verdict has to be
16 unanimous as to each count and each defendant. That's the
17 verdict sheet. And Exhibit H is a copy of the superseding
18 indictment. And again, I want to emphasize the indictment
19 is not evidence. It's just a list of accusations. I'm
20 giving you that so you have a reference point what count
21 on the verdict sheet reflects which count in the
22 indictment. We will give those to juror number 1 to bring
23 back into the jury room.

24 (Court Exhibit G and H received in evidence.)

25 THE COURT: The other thing in terms of

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1 deliberations themselves, obviously, you can continue to
2 deliberate during the lunch break when lunch comes, you
3 can talk about the case or you can take a break, eat lunch
4 and then go back.

5 The one thing I want to emphasize is that if for
6 whatever reason one of the 12 of you is not in the room,
7 sometimes there are smokers or someone is using the
8 restroom or someone leaves the jury room, deliberations
9 have to cease. Once all 12 of you aren't together seated
10 in the room, you have to stop deliberating until that
11 person comes back in the room.

12 I think that's all I have to say but we have to
13 wait until Michele comes back and tells us the alternates
14 are gone.

15 (Pause)

16 THE COURT: Members of the jury, I ask you to
17 retire to the jury room to commence your deliberations.

18 Thank you.

19 (The jury leaves the courtroom.)

20 THE COURT: I ask that you hang around for the
21 next 15 minutes or so; might be a flurry of notes that
22 come out initially. Around 12:30 if you want to go down
23 to the cafeteria and have lunch, that's fine. I will hold
24 any notes until 1:15.

25 MR. LaRUSSO: I will leave my cell number?

6101

1 THE COURT: Yes.

2 If a note comes up at 12:45, I will let everyone
3 eat until 1:15.

4 MR. LaRUSSO: We will come back up here?

5 THE COURT: Yes.

6 You can stay down in the cafeteria as long as
7 you give Michele your cell. You don't have to sit in the
8 courtroom.

9 MR. HALEY: To state the obvious, I'm considered
10 engaged by the Court? I have to put in an affirmation for
11 actual engagement for Judge Baisley.

12 THE COURT: You are engaged.

13 MR. HALEY: Sometimes the thought is, well, the
14 jury is out, you can come see me.

15 THE COURT: When are you supposed to start
16 there?

17 MR. HALEY: They've kind of been waiting for me
18 to finish here.

19 THE COURT: Thank you.

20 (Whereupon, a recess was taken.)

21 (Continued on the next page.)

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1 A F T E R N O O N S E S S I O N .

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3 THE COURT: We received three notes which have
4 been provided to counsel.

5 The first one notifies us that the forewoman is
6 juror number 1.

7 The second one was asking to go down to the Post
8 Office so Michele took two jurors down.

9 The third one is a request for a copy of my
10 instructions. So just so the record is clear, we
11 substituted three pages. These were things I corrected
12 orally.

13 Page 62 at the bottom of the Statute of
14 Limitations, the word "request" was changed for
15 "requirement." For page 72, after the word "money
16 laundering," the last sentence, the word "charge" is
17 added. And page 78, again, Statute of Limitations, the
18 word "request" is changed to "requirement." Those three
19 pages were substituted and which is Court Exhibit K. We
20 gave a copy of those pages to counsel to insert as well.

21 Is there any reason why I can't send that back
22 now as we discussed, the rest of the note?

23 MR. MISKIEWICZ: No, your Honor.

24 MR. LaRUSSO: No, your Honor.

25 THE COURT: Mr. Haley, you want to look at it

6103

1 before it goes back, the charge?

2 MR. HALEY: No, thank you, sir.

3 THE COURT: We can send that back, Exhibit K.

4 (Government Exhibit K received in evidence.)

5 THE COURT: With respect to the rest of the
6 note, it asks for charts. It says, dash, government.

7 So is there an agreement what that relates to?

8 MR. MISKIEWICZ: Yes; both counsel and I
9 conferred.

10 There are a group of several charts, starting
11 with Government Exhibit 20 through Government Exhibit 40.
12 There is another series of charts that is listed Chart 1
13 through Chart 20. So we are in agreement on that.

14 THE COURT: Okay.

15 The timeline is Exhibit 50?

16 MR. MISKIEWICZ: Yes.

17 THE COURT: Any objection to those going back?

18 MR. LaRUSSO: Excuse me, your Honor; just a
19 moment.

20 THE COURT: Government Exhibits 1 through 40 and
21 50?

22 MR. MISKIEWICZ: Yes.

23 MR. HALEY: Thank you, Judge.

24 THE COURT: Any objection to those going back?

25 MR. LaRUSSO: No, your Honor.

6104

1 MR. HALEY: No, your Honor.

2 THE COURT: Michele, you can bring those back.

3 Last one, it says: Bank statements listed in
4 indictment. I don't recall there being any actual bank
5 statements listed in the indictment, right?

6 MR. MISKIEWICZ: Counsel and I have conferred.
7 Unless your Honor wants to ask for clarification, we
8 interpret what they are saying to mean any bank statements
9 referred to in the substantive count, for instance, 30,000
10 wire transfers from Wachovia to TD Bank. For Counts Two
11 really through Nine -- Two through Eight. Subject to
12 counsel disagreeing, I think we are all in agreement
13 that's what they mean.

14 THE COURT: That sounds like a reasonable
15 interpretation. Obviously, if we send those back, they
16 don't agree, that's not what they want, they will let us
17 know. Both defense counsel agree we should send the bank
18 statements that relate to the particular wire transfers
19 that are the subject of Counts Two through Eight?

20 MR. LaRUSSO: We spoke with the government
21 before. We agree that's a reasonable interpretation.

22 MR. HALEY: I think it's reasonable as well.

23 THE COURT: Have those been isolated?

24 MR. MISKIEWICZ: We were just going to begin
25 doing that. It will take us longer to isolate those

6105

1 particular things although they are part of our charts and
2 carts.

3 THE COURT: Do that as quickly as you can. Show
4 it to defense counsel and I will come out as quickly as I
5 can.

6 (Whereupon, a recess was taken.)

7 (Court Exhibit 3 and 4 received in evidence.)

8 THE COURT: So we did get two more notes for
9 various testimony and exhibits but I want to try to finish
10 the one note.

11 So have we put together the bank statements?

12 MR. MISKIEWICZ: Yes, your Honor. We have in
13 response to the questions that are part of Court Exhibit
14 4, I think we have agreement on one all but two exhibits.
15 They are asking for -- I apologize for turning my back --
16 they are asking for operating agreements for all LLCs,
17 Hawaii plus related companies. We read "operating
18 agreements" as "operating agreements." So we have a
19 difference with counsel as to whether or not Kenner
20 Exhibit 25, Kenner Exhibit 217.

21 THE COURT: Before we get to that, I want to get
22 them the bank statements from Court Exhibit 3. Do we have
23 those?

24 MR. MISKIEWICZ: Yes, we have those.

25 THE COURT: Let's do that first. Put on the

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1 record what those exhibits are.

2 MR. MISKIEWICZ: These are the exhibits related
3 to the bank statements in the indictment. I think that's
4 where the question is. It's Government Exhibit 2303,
5 1604, 1724, 1727, 3302, 3301, 3306, 3304, 3305, 1101,
6 1404, 1903, 2009, 1405 and 2011. Then they have also more
7 recently asked for all Gaarn statements.

8 You want me to go over that?

9 THE COURT: Let's stick to the -- with respect
10 to the note which is Court Exhibit 3, the bank statements
11 listed in the indictment, is there an agreement on those
12 from counsel?

13 MR. LaRUSSO: There are.

14 MR. HALEY: Yes, sir.

15 THE COURT: Those can go back.

16 (Court Exhibit 5 received in evidence.)

17 THE COURT: Now we have provided both of these
18 counsel, Court Exhibit 4 and 5. Let's go through it.
19 Operating agreements for all LLCs, Hawaii and related
20 companies.

21 Tell me what there is an agreement on and what
22 there is not an agreement on.

23 MR. MISKIEWICZ: We agree on Defense Exhibit C
24 265 and Government's 210. Also, they specifically
25 requested C 279.

6107

1 MR. LaRUSSO: Those are the Eufora ones, your
2 Honor, not Hawaii. It's the operating agreement for
3 Eufora is C 265. The government's amended restated
4 operating agreement for Eufora is 210. Then the chart is
5 C 279.

6 THE COURT: Those are all Eufora?

7 MR. LaRUSSO: That's just Eufora, your Honor.

8 The only issue there is "and related companies,"
9 I don't think we discussed it. I'm not sure what that
10 means.

11 THE COURT: There are no related companies to
12 Eufora?

13 MR. LaRUSSO: You can stretch and talk AZ
14 Avalon. I think we are guessing. That's why I don't
15 think we have much agreement on what that means.

16 THE COURT: Are there operating agreements for
17 AZ Avalon?

18 MR. LaRUSSO: Not in evidence, I believe. My
19 recollection after nine weeks can't be trusted.

20 THE COURT: What about Hawaii and related
21 companies? Do we have agreement on that?

22 MR. MISKIEWICZ: We have the operating agreement
23 for Little Isle IV, Kenner Exhibit 1. Operating agreement
24 for WWK Hawaii Holdings LLC, Kenner Exhibit 219. There is
25 an operating agreement for Big Isle VI Ventures which is

6108

1 Government Exhibit 6017. And we have a disagreement
2 whether these should be included for Hawaii LLCs, that is
3 the bylaws for Little Isle IV, which came in as Kenner
4 Exhibit 25 and Kenner Exhibit 217.

5 MR. HALEY: May I be heard?

6 THE COURT: Yes.

7 MR. HALEY: We wanted to show your Honor if you
8 look at the operating agreement, Government 6017, it
9 defines managing members, authority of managing members,
10 the terms of office and things of that nature. Kenner
11 Exhibit 25 and 217 though titled bylaws for Little Isle IV
12 contain essentially the same matters as set forth. The
13 operating agreement, frankly, was testified at great
14 length. It was the operating agreement originally
15 established for Little Isle IV. Though it says bylaws, it
16 was setting the purpose for which Little Isle IV was
17 established. Indeed, bylaws 217 goes on and identifies
18 Little Isle IV as an organized group of investors. If I
19 show your Honor these two documents, the Court will
20 conclude these are functionally operating agreements
21 although not listed as such.

22 THE COURT: To go back to the other companies,
23 there were a lot of Hawaii entities we don't have
24 operating agreements for, all the other ones?

25 MR. MISKIEWICZ: No, your Honor. We have -- one

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1 could interpret the request to include the operating
2 agreement for Urban Expansion. We haven't really
3 submitted that. Other than -- I'm not aware of any other
4 Hawaii, specifically Hawaii related operating agreements.

5 MR. HALEY: My point is not to represent to be
6 over inclusive rather than under inclusive. If the
7 document is not something the jury wishes to review, they
8 won't review it. But I think the bylaws set forth the
9 purpose for which Little Isle IV exists.

10 THE COURT: I'm going to allow it to go back. I
11 think it's always better to be over inclusive than under
12 inclusive especially as relates to this particular issue.
13 Although they are not called operating agreements, they do
14 describe various aspects to the entities and the rights
15 and responsibilities and obligations. So in terms of
16 membership, composition, managing member, so it could be
17 construed as analogous to an operating agreement so I will
18 send those back as well.

19 Mr. Haley is right, if the jury doesn't care
20 about the bylaws, they can toss them aside and but at
21 least I will give them to them.

22 MR. HALEY: Thank you, your Honor.

23 THE COURT: So then as relates to those items,
24 there are no remaining disputes, right?

25 MR. MISKIEWICZ: No, your Honor.

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1 MR. LaRUSSO: No. The testimony of Mr. Melley.
2 We looked at the Gaarn statements.

3 THE COURT: Can we put the Gaarn statements,
4 what exhibit numbers?

5 MR. MISKIEWICZ: The Gaarn statements are
6 Government Exhibits 2301, 2302, 2303, 2304, 2305, 2306.

7 THE COURT: Okay. So why don't we send back all
8 the documents that relate to Court Exhibit 4 that we have
9 identified.

10 MR. MISKIEWICZ: Also, your Honor, they want the
11 testimony of Mr. Melley. We have identified that he
12 testified on June 2.

13 THE COURT: Let's get the documents back there.
14 Is there agreement with the documents on Court
15 Exhibit 4?

16 MR. LaRUSSO: Yes; the ones we identified.

17 MR. HALEY: Yes, your Honor.

18 THE COURT: You have the bylaws there?

19 MR. MISKIEWICZ: Excuse me?

20 THE COURT: The bylaws are there too?

21 MR. MISKIEWICZ: Yes, Kenner -- sorry, Kenner 25
22 and Kenner 217, yes.

23 THE COURT: Give those to Michele.

24 MR. MISKIEWICZ: I will do it again for the
25 record. Eufora related documents. They did specifically

6111

1 request C 279 and the operating agreements for Eufora we
2 located are C 265 and C 210.

3 THE COURT: Okay. The only thing left from
4 Court Exhibit 4 is Peter Melley's testimony which is June
5 2.

6 MR. MISKIEWICZ: Yes.

7 THE COURT: I think it's relatively short.

8 MR. HALEY: Your Honor has a copy of the
9 transcript?

10 THE COURT: Yes; 2477 to 2488. Actually, just
11 objections that I sustained on 2488 so it actually stops
12 -- the answer stops on 2487. Actually, not a single
13 objection in that whole -- up until the end, only an
14 objection at the end. Looks like everything else is
15 clean.

16 Are we in agreement on that?

17 MR. MISKIEWICZ: Yes, your Honor.

18 MR. HALEY: Yes, your Honor.

19 MR. LaRUSSO: Yes, your Honor.

20 THE COURT: Then have you discussed Court
21 Exhibit 5 or haven't gotten to that yet?

22 MR. MISKIEWICZ: We have located the Led Better
23 operating agreement. That's ready to go back. We just
24 started looking for the remaining --

25 THE COURT: When they say "all spread sheets

6112

1 from trial," what does that mean?

2 MR. LaRUSSO: The only spread sheet I remember,
3 Government 767, the Global Settlement spread sheet.
4 That's what came to mind.

5 MS. KOMATIREDDY: We admitted a number of spread
6 sheets through forensic accountant Petrellese. Putting
7 together in one place now it's 1 through 10, 14 through 16
8 and then on exhibit lists that will take a minute to go
9 through but they are on the exhibit list as 41, 41A, 41B,
10 43, 43A, 44B, 45B, 46, 46B, 47, 47B, 48, 48B, 49, 49B.
11 Those are all spread sheets related to the various Eufora
12 transactions, the 2008, 2009 Eufora frauds and spread
13 sheets related to Constantine Management Group getting
14 money from the Hawaii accounts.

15 Then 60B, 61, 61B, 62 and 62B, all spread sheets
16 related to the Urban Expansion loan and additional spread
17 sheets related to the Eufora 2008 fraud.

18 Then we admitted a series of spread sheets that
19 summarize the lines of credit transaction histories and
20 the Hawaii accounts. Those spread sheets with respect to
21 the Hawaii accounts were 63A through 70A. Each one of
22 those numbers has a capital A after it. The spread sheets
23 summarizing the lines of credit were 71 through 79.
24 Lastly, the spread sheet with selected expenditures from
25 the Global Settlement Fund was 80.

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1 THE COURT: Those were all through Agent
2 Petrellese?

3 MS. KOMATIREDDY: Yes. And 80 was Special Agent
4 Wayne.

5 THE COURT: Then we have Mr. Haley, your spread
6 sheet?

7 MR. HALEY: Yes, your Honor. In that regard I
8 have not discussed it with the government. I would
9 suggest of course the CR Gentry, Kenner Exhibit 228, I
10 guess there is agreement on that. And the 767 spread
11 sheet relates to the Ron Richards.

12 THE COURT: Government exhibit?

13 MR. HALEY: That's a government exhibit. And
14 the other item which we would maintain is a spread sheet
15 in substance -- let the government take a look at it.
16 It's in evidence.

17 MR. MISKIEWICZ: It's an e-mail from CR Gentry
18 to Mr. Gaarn. I can hand it up to your Honor.
19 Defendant's C140.

20 THE COURT: This is a Constantine?

21 MR. HALEY: No.

22 THE COURT: Why is it C?

23 MR. LaRUSSO: I think Mr. Haley has it marked as
24 K80, if I'm not mistaken. I think it was K80. Ours was
25 the C number.

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1 THE COURT: Can I see K228?

2 MR. HALEY: Sure.

3 THE COURT: I will let K80 go back. If the CR
4 Gentry -- if Kenner 228 is going back even though it's an
5 e-mail, bears the same type of information the spread
6 sheet conveyed, I will broadly construe that as part of
7 the CR Gentry issue so then is there any other spread
8 sheets?

9 MR. LaRUSSO: Other than the one that Mr. Haley
10 mentioned, it's actually listed as 767 on the government's
11 exhibit list as Kenner Constantine Global Settlement Fund
12 spread sheet.

13 THE COURT: 228, 767, C140 and then all of the
14 ones that Ms. Komatireddy identified as came in through
15 Agents Petrellese and Wayne would all go in.

16 MR. HALEY: Yes, sir.

17 MR. LaRUSSO: Yes, sir.

18 MR. MISKIEWICZ: 2, Led Better operating
19 agreements.

20 THE COURT: Which are?

21 MR. MISKIEWICZ: Kenner 33 and Government
22 Exhibit 703.

23 THE COURT: Agreement on that, Mr. LaRusso?

24 MR. LaRUSSO: Sorry?

25 THE COURT: I know it doesn't relate to your

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1 client, Led Better operating agreements.

2 MR. LaRUSSO: No objection.

3 MR. HALEY: No objection.

4 THE COURT: So the ones Ms. Komatireddy
5 identified, are they in a stack?

6 MS. KOMATIREDDY: Almost.

7 MR. MISKIEWICZ: We have identified all of the
8 spread sheets and they are all here except one, Government
9 Exhibit 49. We are getting it from our office.

10 THE COURT: Since there are a lot of exhibits,
11 if Mr. LaRusso, Mr. Haley, I want you to again put them
12 all in a pile so they see what is going back there and put
13 the numbers on the record.

14 Because there are so many, I want to make sure
15 everyone is on the same page. Mr. Miskiewicz, look at
16 what he is referring to and read off the number.

17 MR. MISKIEWICZ: Government Exhibit 767 is the
18 Ron Richards' chart. I will begin with the other spread
19 sheets, Government Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,
20 14, 15, 16.

21 THE COURT: Keep going.

22 MR. MISKIEWICZ: And then Government Exhibits
23 41, 41A, 41B, 43, 43A, 44B, 45B, 46, 46B, 47, 47B, 48,
24 48B, 49B. We are awaiting 49. And now finally Government
25 Exhibits 60, 60B, 61, 61B, 62, 62B, 63A, 64A, 65A, 66A,

1 67A, 68A, 69A, 70A, 71, 72, 73, 74, 75, 76, 77, 78, 79 and ⁶¹¹⁶
2 80.

3 Also, we read the Led Better operating
4 agreements but in addition Kenner 228 and then the Kenner
5 80 or C140 which your Honor reviewed.

6 THE COURT: Then the operating agreements again.

7 MR. MISKIEWICZ: The operating agreements for
8 Led Better, Government 703 and Kenner 33.

9 THE COURT: Everyone is in agreement on those?

10 MR. LaRUSSO: Yes.

11 MR. HALEY: Yes.

12 MR. MISKIEWICZ: Yes.

13 THE COURT: You want to wait for 49 for a
14 minute?

15 MR. LaRUSSO: Up to you.

16 MR. MISKIEWICZ: We can notify the Court when it
17 comes in and counsel has had an opportunity to review it.

18 THE COURT: Let's wait a minute. Should take a
19 minute, right?

20 MR. MISKIEWICZ: Yes.

21 THE COURT: Let's bring them in and read back
22 Mr. Melley and -- here it comes now.

23 49 is here?

24 MR. MISKIEWICZ: Yes.

25 THE COURT: Everybody is okay on that one?

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1 MR. LaRUSSO: Yes.

2 MR. MISKIEWICZ: Yes.

3 MR. HALEY: May I have a moment?

4 THE COURT: Mr. LaRusso, you are okay with that?

5 MR. LaRUSSO: Thank you, your Honor.

6 MR. HALEY: Yes, sir.

7 THE COURT: I saw you brought another document
8 up.

9 MR. HALEY: No, Judge; I wanted to confirm with
10 my client that -- I showed my client Kenner Exhibit 80 and
11 Kenner Exhibit 228. I had a question.

12 THE COURT: All those can go back.

13 MR. HALEY: Yes.

14 THE COURT: Why don't I bring them out and tell
15 them that I think we responded to all their requests for
16 various documents. I think I should mention that we
17 weren't sure what they referred to by "related companies"
18 for Eufora so we produced Hawaii related companies.
19 Eufora and Exhibit C279, we didn't know if they were
20 referring to related companies that related to Eufora. If
21 they want to clarify that, we will try to address it.
22 Then we will read back Mr. Melley and tell them that we
23 will not be able to do Richards before 4:30. We will do
24 the readback of Mr. Richards first thing in the morning.
25 Does that sound good?

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1 MR. MISKIEWICZ: Yes, your Honor.

2 MR. LaRUSSO: Yes.

3 THE COURT: If the readback doesn't take till
4 4:30, I will let them go until 430 rather than send them
5 home a few minutes early.

6 (The jury enters the courtroom.)

7 THE COURT: Please be seated.

8 If I can speak to the lawyers at sidebar for one
9 second.

10 (Continued on the next page.)

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1 (Sidebar.)

2 THE COURT: The court reporter noted on page
3 2477 line 22, it says FINRA is a self regulatory -- it
4 says "history." I think that's a typo; should be
5 "industry."

6 Everyone agree?

7 MR. LaRUSSO: Yes.

8 MR. MISKIEWICZ: Yes.

9 MR. HALEY: Yes.

10 (Sidebar concluded.)

11 (Continued on the next page.)

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1 (In open court.)

2 THE COURT: I think I responded to all your
3 requests for various documents. If you ever make a
4 request for certain documents and you get the documents,
5 there is something else you are looking for, send me
6 another note and I will do my best to respond to the
7 notes. But if for some reason I get it wrong, just write
8 me another note.

9 One thing I did want to mention is that you
10 requested operating agreements for all LLCs and it says
11 Hawaii and related companies which we gave you. It says
12 Eufora and related companies. On that one we gave you the
13 documents related to Eufora including C279 but I wasn't
14 sure when you said Eufora and related companies what other
15 companies. So if there are other companies you are
16 referring as relates to Eufora, send me another note
17 letting me know what you'd like.

18 I did bring you out here to do the readback of
19 testimony in Court Exhibit 4, the note which I marked
20 Court Exhibit 4. You requested Peter Melley's testimony
21 so I'm going to have the court reporter read that back.

22 (Whereupon, the requested testimony was read
23 back in open court.)

24 THE COURT: There was no cross-examination so
25 that is his testimony ended at that point.

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1 Okay. So it's 4:29. So I'm going to have you
2 go home for the day.

3 The only -- as far as I understand, the only
4 remaining item you requested from me which is not
5 responded to is Ron Richards' testimony. I will work with
6 the lawyers to isolate that for you.

7 When you ask for testimony, if I don't bring you
8 out right away, we have to work with the court reporter to
9 find that testimony and isolate it. We will do that and
10 you will reconvene your deliberations testimony morning at
11 9:30. I want to emphasize, don't read or listen to
12 anything regarding the case. You can't discuss the case
13 with anyone until you are all together, all 12 of you are
14 together, tomorrow morning at 9:30 and you can reconvene
15 your deliberations.

16 I won't bring you in tomorrow morning. When
17 everybody is here you can start deliberating again, as
18 soon as all 12 of you are there. Again, wait until all 12
19 of you are there. Once all 12 are present, let Michele or
20 the court security officer know all 12 are there and you
21 can continue your deliberations.

22 And some time tomorrow morning, probably shortly
23 after you arrive, we will bring you in for the Ron
24 Richards' readback.

25 Have a good night. See you tomorrow morning.

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1 (The jury leaves the courtroom.)

2 THE COURT: Let's find the Ron Richards'
3 testimony so we have it all set for tomorrow morning.

4 Do you know what date that is?

5 MR. MISKIEWICZ: Looking for it right now.

6 MR. LaRUSSO: We noticed in reviewing the
7 transcripts over the last four or five days, there may be
8 some mistakes, typographical errors. If there are anymore
9 major ones we think we need to discuss with the Court, can
10 we bring that up, if that's all right with you?

11 THE COURT: Yeah, that's fine.

12 (Court Exhibit 6 received in evidence.)

13 THE COURT: Court Exhibit 6, we will give a copy
14 to the lawyers, it says: Can we have the following
15 operating agreements, AZ, Eufora Partners. I guess that
16 is what the related entity was.

17 MR. LaRUSSO: I don't know if there is one, your
18 Honor, to be honest with you. I don't think one went in.

19 THE COURT: Does the government agree?

20 MS. KOMATIREDDY: Agreed, your Honor. There is
21 not one.

22 THE COURT: Tomorrow morning when I bring them
23 out for the Ron Richards' readback, I will tell them there
24 is no such agreement.

25 Mr. Richards', Mr. Oliveras said, is 3794

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1 through 3877. If you want to review it tonight to make
2 sure there are no errors, that's what we will do tomorrow.

3 MR. HALEY: Rather than saying there is no
4 agreement, I would prefer saying no such document was
5 introduced into evidence.

6 THE COURT: I will say no such document was
7 introduced into evidence.

8 MR. HALEY: Thank you.

9 THE COURT: We will reconvene tomorrow at 9:30.
10 Have a good night.

11 MR. LaRUSSO: Thank you, your Honor.

12 MR. MISKIEWICZ: Thank you, your Honor.

13 (The trial was adjourned to Wednesday, July 8,
14 2015 at 9:30 a.m.)
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5 COURT'S CHARGE 6017

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7 E X H I B I T S

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10 Court Exhibit G and H received 6099

11 in evidence

12 Government Exhibit K received in 6103

13 evidence

14 Court Exhibit 3 and 4 received 6105

15 in evidence

16 Court Exhibit 5 received in 6106

17 evidence

18 Court Exhibit 6 received in 6122

19 evidence

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<p>\$</p> <p>\$150,000 [1] - 6050:2 \$25,000 [1] - 6049:23 \$30,000 [1] - 6049:15 \$35,000 [1] - 6051:7 \$40,300 [1] - 6049:19 \$43,000 [1] - 6051:3 \$50,000 [1] - 6050:6</p> <p>1</p> <p>1 [8] - 6099:10, 6099:22, 6102:6, 6103:12, 6103:20, 6107:23, 6112:7, 6115:19 10 [3] - 6014:9, 6112:7, 6115:19 11 [1] - 6018:23 1101 [1] - 6106:5 11201 [1] - 6013:14 11722 [1] - 6013:22 1180 [1] - 6013:21 11:00 [1] - 6063:12 11:15 [1] - 6018:23 12 [11] - 6049:15, 6090:19, 6098:13, 6099:6, 6100:6, 6100:9, 6121:13, 6121:18, 6121:19, 6121:20 12:30 [2] - 6099:1, 6100:22 12:45 [1] - 6101:2 13-CR-607 [1] - 6013:3 1343 [4] - 6051:12, 6065:18, 6079:6, 6080:17 1349 [3] - 6065:20, 6079:6, 6080:17 14 [2] - 6112:7, 6115:20 1404 [1] - 6106:6 1405 [1] - 6106:6 15 [3] - 6054:24, 6100:21, 6115:20 15-minute [1] - 6063:9 16 [2] - 6112:7, 6115:20 1604 [1] - 6106:5 1724 [1] - 6106:5 1727 [1] - 6106:5 18 [14] - 6051:12, 6065:18, 6065:19, 6072:25, 6073:4, 6075:18, 6078:17, 6079:5, 6079:13, 6080:3, 6080:16, 6080:23, 6081:1, 6081:8 1903 [1] - 6106:6 1956 [3] - 6080:24, 6081:8, 6081:11 1956(a)(1)(B)(i) [1] - 6082:25 1956(a)(1)(B)(i) [2] - 6079:13, 6082:23 1956(h) [2] - 6081:1, 6081:2 1956(h) [2] - 6078:18,</p>	<p>6080:4 1:15 [2] - 6100:24, 6101:3 1st [2] - 6050:4, 6050:8</p>	<p>31 [1] - 6051:7 33 [2] - 6114:21, 6116:8 3301 [1] - 6106:5 3302 [1] - 6106:5 3304 [1] - 6106:5 3305 [1] - 6106:5 3306 [1] - 6106:5 3794 [1] - 6122:25 3877 [1] - 6123:1</p>	<p>62 [3] - 6102:13, 6112:15, 6115:25 62B [2] - 6112:15, 6115:25 631 [1] - 6013:22 63A [2] - 6112:21, 6115:25 64A [1] - 6115:25 65A [1] - 6115:25 66A [1] - 6115:25 67A [1] - 6116:1 68A [1] - 6116:1 69A [1] - 6116:1</p>
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